LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
FEB 25 1955
HAROLD B. WILEY, Clerk

No. 4

In the Supreme Court of the United States

OCTOBER TERM, 1954

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
PAUL A. SWEENEY,
LEAVENWORTH COLBY,
HERMAN MARCUSE,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	6
Interest of the United States	11
Summary of argument	12
Argument	19
I. A person who is subjected to third party liability as the result of the improper performance of a contract by his independent contractor is entitled to be reimbursed for his damages by such contractor, and this liability is not defeated because the person employing the contractor failed to discover the dangerous condition which the contractor created	20
A. The ship is entitled to recover from the stevedore since the breach of the duty to stow the cargo properly, owed by the stevedore to the ship, subjected the ship to liability to the longshoreman	20
1. Indemnity, as used in this case, means the right to recover damages resulting from the breach of a contractual duty in consequence of which a liability has been imposed upon the person to whom the contractual duty was owed	20

333031—55——1

Argument—Continued

Page

2. The improper stowage of the pulp rolls constituted the breach of a contractual duty owed by the stevedoring company to the ship 27

B. The right to reimbursement for breach of contract is not defeated by a finding of failure to discover or to correct a defect caused by the expert independent contractor 29

1. A contractor cannot defeat a claim for indemnity by urging that his client's reliance on his professed skill constituted negligence 29

2. Since the ship owed its duty to discover improper stowage only to the longshoreman and not to the stevedore, its negligence does not defeat the right to indemnity 32

II. The ship's right to be indemnified for the liability cast upon it as the result of the stevedore's breach of contract is not defeated by the operation of the Longshoremen's and Harbor Workers' Compensation Act 37

A. The inability of the longshoreman to sue the stevedore does not in itself defeat the ship's right to reimbursement from the stevedore 37

B. Section 5 of the Longshoremen's Act does not prohibit suits for compensatory indemnity 41

1. The exclusive remedy provision of Section 5 is limited to the employee and his dependents; it does not ap-

Argument—Continued Page

ply to persons whose claims are based upon contracts independent of the employment relationship 42

2. Since petitioner's liability to respondent is based upon the breach of an independent contractual duty owed to respondent, it is not "on account of such [the employee's] injury or death" 45

3. The inapplicability of section 5 in indemnity cases does not violate the statutory plan or injure the employee 49

Conclusion 52

CITATIONS

Cases:

Aktslsk. Cuzco v. *The Sucarseco*, 294 U. S. 394 17, 39

Alaska S. S. Co. v. *Petterson*, 347 U. S. 396 12, 49

American District Telegraph Co. v. *Kittleson*, 179 F. 2d 946 18, 44, 46

American Mutual Liability Co. v. *Matthews*, 182 F. 2d 323 16, 34, 47, 48

American Stevedores v. *Porello*, 330 U. S. 446 21

Atlantic Transport Co. v. *Imbrovek*, 234 U. S. 52 21

Baccile v. *Halcyon Lines*, 187 F. 2d 403, reversed, sub. nom. *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282 26, 37

Bankers Indemnity Ins. Co. v. *Cleveland Hardware & Forging Co.*, 77 Ohio App. 121 47

Baugh v. *Rogers*, 24 Cal. 2d 200 44, 46

Berti v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 15, 34

Bethlehem Shipbuilding Corp. v. *Joseph Gutzadt Co.*, 10 F. 2d 769 13, 25, 31

Blaikie v. *Stembridge*, 6 C. B. (N. S.) 894, 141 Eng. Rept. 703, affirmed, 6 C. B. (N. S.) 911, 141 Eng. Rept. 710 28

Cases—Continued

Page

Booth-Kelly Lumber Co. v. *Southern Pacific Co.*, 183 F. 2d 902 32

Boston Woven Hose etc. Co. v. *Kendall*, 178 Mass. 232 ..... 14, 22, 30, 31

Briggs v. *City of Philadelphia*, 112 Pa. Super. Ct. 50 39

Brown v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16 ..... 15, 34, 46, 48

Buggs v. *Wolff*, 201 Wisc. 533 47

Burris v. *American Chicle Co.*, 120 F. 2d 218 46

Bush Terminal, In re, 93 F. 2d 659 43

Canadian Transport Co. v. *Court Lines, Ltd.*, [1940] A. C. 934 28

Cardinal v. *State of New York*, 304 N. Y. 400, certiorari denied, 345 U. S. 918 50

Case v. *Pillsbury*, 148 F. 2d 392 40

Catherine Chalmers, The, 2 Asp. Mar. Cas. (N. S.) 598 28

Chase v. *New Haven Waste Material Corp.*, 111 Conn. 377 38

Chattahoochee, The, 173 U. S. 540 ..... 17, 39

City of Chicago v. *Robbins*, 2 Black 418 21

Congressional Country Club v. *Baltimore & Ohio R. Co.*, 194 Md. 533 47

Cornec v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, certiorari denied, 284 U. S. 621 ..... 14, 27, 28, 29, 33

Crawford v. *Pope & Talbot, Inc.*, 206 F. 2d 784 ..... 15, 18, 26, 34, 41, 45

Derry Electric Co. v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51 32

Dunn, v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214 ..... 13, 23

Edith, The, 10 F. 2d 684 ..... 14, 28

Elder, Dempster & Co. v. *Paterson, Zochonis & Co.*, [1924] A. C. 522 28

Emerson v. *Western Seed & Irrigation Co.*, 116 Neb. 180 ..... 38, 40

Evelyn, The, 282 Fed. 250 27

Farm Bureau Mut. Auto. Ins. Co. v. *Kohn Bros. Tobacco Co.*, 107 A. 2d 406 (Conn.) 46

Cases—Continued

	Page
Farren v. *New Jersey Turnpike Authority*, 31 N. J. Super. 356, 106 A. 2d 752	46
Gallagher v. *United States Lines Co.*, 206 F. 2d 177, certiorari denied, 346 U. S. 897	28
General Accident, etc. v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122	32
George's Radio v. *Capital Transit Co.*, 126 F. 2d 219	21
Gill v. *United States*, 184 F. 2d 49	34, 47
Gooch v. *United States*, 297 U. S. 124	43
Graham v. *Miller*, 182 Tenn. 434	38
Guse v. *A. O. Smith Corp.*, 260 Wisc. 403	47
H. & C. Grayson v. *Ellerman Line*, [1920] A. C. 466	41, 31
Hadley v. *Baxendale*, 9 Ex. 341, 156 Eng. Repts. 145	22
Halcyon Lines v. *Haenn Ship. Corp.*, 342 U. S. 282	13, 26, 35, 48
Hastorf Contracting Co. v. *Ocean Transportation Corporation*, 4 F. 2d 583, affirmed, 4 F. 2d 584	14, 33
Hawn v. *Pope & Talbot, Inc.*, 198 F. 2d 800, affirmed 346 U. S. 406	47
Hensel v. *Hensel Yellow Cab Co.*, 209 Wis. 489	39
Hudson v. *Gas Consumers' Association*, 123 N. J. L. 252	38
Hunsucker v. *High Point, etc. Chair Co.*, 237 N. C. 559	47, 48
Indien, The, 71 F. 2d 752	14, 28
Jones v. *Kinney*, 113 F. Supp. 923	16, 39
Koontz v. *Messer*, 320 Pa. 487	16, 38
Lo Bue v. *United States*, 188 F. 2d 800	35, 41, 47, 48, 50
Lunderberg v. *Bierman*, 63 N. W. 2d 355 (Minn., 1954)	44, 46
McFall v. *Compagnie Maritime Belge*, 304 N. Y. 314	15, 23, 26, 33, 41, 46
McGeeney v. *Moran Towing Corp.*, 149 F. 2d 791	27, 29
Maine v. *Maine & Sons Co.*, 198 Iowa 1278	38
Maio v. *Fahs*, 339 Pa. 180	17, 40, 48
Manning Mfg. Co. v. *Hartol Products Corp.*, 99 F. 2d 813	32

Cases—Continued

Page

Maryland Cas. Co. v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731 24

Metcalfe v. *Chiarello*, 294 Fed. 29 27

Mikkelsen v. *S. S. Granville*, 191 F. 2d 858, rehearing denied, 192 F. 2d 809 ..... 35, 47

Miller v. *J. A. Tyrholm & Co. Inc.*, 196 Minn. 438 38

Mowbray v. *Merryweather*, [1895] 2 Q. B. 640 ..... 13, 14, 21, 25, 31

Olsen v. *United States Shipping Co.*, 213 Fed. 18 28

Oxford Paper Co. v. *The Nidarholm*, 282 U. S. 681 28

Paterson, Zochonis & Co. v. *Elder, Dempster & Co.*, [1923] 1 K. B. 420 12

Peak Drilling Co. v. *Halliburton Oil Well Cementing Co.*, 215 F. 2d 368 ..... 47, 48

Pope & Talbot, Inc. v. *Hawn*, 346 U. S. 406 ..... 35, 48, 49

Poulin v. *Graham*, 120 Vt. 307 39

Read v. *United States*, 201 F. 2d 758 ..... 15, 33, 46

Red Star Barge Line v. *Luria Bros. & Co.*, 116 F. Supp. 656 33

Rich v. *United States*, 177 F. 2d 688 ..... 15, 33, 41, 46

Riegger v. *Burton Brewing Co.*, 178 Md. 518 38

Robbins v. *City of Chicago*, 4 Wall. 657 21

Robert R., The, 255 Fed. 37 ..... 14, 27, 29

S. C. L. No. 9, The, 114 F. 2d 964 27

Sanchez v. *Hill Lines*, 123 F. Supp. 42 47

Schubert v. *Schubert Wagon Co.*, 249 N. Y. 253 ..... 13, 16, 18, 23, 38, 45

Seaboard Stevedoring Corp. v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 ..... 15, 33

Seas Shipping Co. v. *Sieracki*, 328 U. S. 85 ..... 10, 29, 49

Slattery v. *Marra Bros.*, 186 F. 2d 134 ..... 15, 34, 41, 47, 48

Slingsby, The, 116 Fed. 227, affirmed, 120 Fed. 748 34

Smith v. *Nicholson Transit Co.*, 39 F. Supp. 795 29

Spaulding v. *Parry Nav. Co.*, 187 F. 2d 257 ..... 34, 47

Standard, etc. v. *Ruckert Ter. Corp.*, 193 Md. 20 47

States S. S. Co. v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253 ..... 15, 26, 33-34, 46

Cases—Continued

	Page
Union Stock Yards Co. v. *Chicago, etc., R. Co.*, 196 U. S. 217	22, 30
Union Sulphur & Oil Co. v. *W. J. Jones & Sons, Inc.*, 195 F. 2d 93	35
United States v. *Alpers*, 338 U. S. 680	43
United States v. *Arrow Stevedoring Co.*, 175 F. 2d 329, certiorari denied, 338 U. S. 904	36, 44, 46
United States v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236	39, 40
United States v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181	15, 33, 35, 46
United States v. *Savage Truck Line*, 209 F. 2d 442, certiorari denied, 347 U. S. 952	24, 35
United States v. *Yellow Cab Co.*, 340 U. S. 543	48
Washington Gas Light Co. v. *District of Columbia*, 161 U. S. 316	21
Westchester Lighting Co. v. *Westchester County Small Estates Corp.*, 278 N. Y. 175	17, 18, 40, 43, 46
Wright v. *Wright*, 229 N. C. 503	24, 38
Yearicks v. *City of Wildwood*, 23 N. J. Super. 379	46

Statutes:

Carriage of Goods by Sea Act, Section 4, 49 Stat. 1210, 46 U. S. C. 1304	39
Harter Act, 27 Stat. 445, Section 3, 46 U. S. C. 192	39
Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424:	
Section 5 (44 Stat. 1426, 33 U. S. C. 905)	2, 17, 18, 37, 41, 42, 46, 49
Section 32	50
Section 33 (44 Stat. 1440, as amended, 33 U. S. C. 933)	3, 41, 49, 51, 52
N. Y. Workmen's Compensation Act	40

Miscellaneous:

Contribution and Indemnity Between Joint Tort Feasors, Note, 45 Harv. Law Rev. 349, 351-352	32
Keener, *Quasi-Contracts*, pp. 25 and 408	21

Miscellaneous—Continued Page

Larson, *The Law of Workmen's Compensation*, Vol. 2:
Section 76.30, p. 235 43
Section 76.43, pp. 237, 238 34
Appendix E, p. 564 50
Leflar, *Contribution and Indemnity between Tort-feasors*, 81 U. of Pa. Law Rev. 130, 147, 156–158 ..... 21, 32
Restatement of the Law of Agency, Section 401 (c) 25
Restatement of the Law of Contracts, Section 334 24–25
Restatement of the Law of Restitution:
Part I, Chapter 3, Topic 3, Introductory note, pp. 328–329 25
Section 76 21
Section 86 21
Section 93 32
Section 95, Comment a, par. 2 32
Sections 93–96 25
Seavey & Scott's Notes on the *Restatement of the Law of Restitution*, p. 150 25
Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 417, 423 ..... 12, 49
Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. of Pa. Law Rev. 321 (Dec. 1954) 20
Williston, *Contracts* (Rev. Ed. 1937), Section 1394 25
Williston, *Sales* (Rev. Ed. 1948), Section 614 (a) 25
Woodward, *Law of Quasi-Contracts*, p. 409 21

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 316–319) is reported at 111 F. Supp. 505. The opinion of the United States Court of Appeals for the Second Circuit (R. 324–328) is reported at 211 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1954 (R. 327). The petition for a writ of certiorari was filed on June 21, 1954, and granted on October 14, 1954 (R.

333051—55——2

329, 348 U. S. 813). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a ship which has been held liable to a longshoreman for injuries suffered in an accident caused by the contracting stevedore's breach of its contractual duty to the ship to stow the ship's cargo safely is entitled to be indemnified by the stevedore for the damages so assessed.

2. If so, whether the exclusive liability provision of Section 5 of the Longshoremen's and Harbor Workers' Act impairs the ship's remedy for the breach of this independent contractual duty owed by the employer (the stevedore), not to the longshoreman, but to a third party (the ship).

STATUTES INVOLVED

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1426, 33 U. S. C. 905) provides:

> SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of

compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1440, 33 U. S. C. 933), as amended by the Act of June 25, 1938, Secs. 12 and 13 (52 Stat. 1168) and Reorganization Plans No. 2 of 1946 (60 Stat. 1095) and No. 19 of 1950 (64 Stat. 1271), provides:

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all

right of the person entitled to compensation to recover damages against such third person.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accord-

ance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined

in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a), or may authorize the parent or guardian of the minor to make such election.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

STATEMENT

In 1949, the S. S. *Canton Victory*, operated by the respondent, Pan-Atlantic S. S. Corp. (referred to in this brief as Pan-Atlantic or the ship), under a bareboat charter (R. 8, 9), was engaged in the coastwise cargo trade between the Atlantic and Gulf ports (R. 213). The petitioner, Ryan Stevedoring Company, Inc. (referred to as Ryan, the stevedore, or the stevedoring company), was under contract to perform all stevedoring services on Pan-Atlantic's vessels (R. 26–31).[1]

In July 1949, the *Canton Victory* loaded a cargo of pulp board at Georgetown, South Carolina, for discharge at New York (R. 216). Pulp

[1] Respondent's opposition to the petition for certiorari discloses that petitioner and respondent are both wholly owned subsidiaries of Waterman S. S. Corporation (Respondent's Brief in Opposition, p. 3).

board is used to make corrugated paper and bags (R. 213). It comes in rolls of uniform diameter of about four feet, their length varying from three to five feet depending on the customers' needs (R. 239–240). The method of stowage used in the instant case, the chine or nesting method, consists of placing one layer of rolls horizontally on the floor, a second layer is nested in the troughs between the rolls of the bottom layer, a third layer may be placed on top of this one (R. 188, 191; cf. Def. Exh. D, R. 312A). In order to immobilize the bottom layer it is necessary to secure or "chock" it either with wedges, or with planks (dunnage) at least four inches high (R. 233–234).

In the instant case Ryan loaded the pulp rolls at Georgetown, South Carolina, and unloaded them at Brooklyn, New York (R. 37, 216). When the *Canton Victory* docked at Brooklyn, one Palazzolo was employed by Ryan as a longshoreman to unload the after end of Hatch No. 3, in which the pulp was stowed (R. 50). Another gang, working in the forward end of the same hatch, disturbed a tier of rolls, as the result of which one of them, weighing about 3,200 pounds (R. 118), worked itself free and struck Palazzolo, crushing his left leg (R. 90–91, 111–112, 134–135).

Ryan did not contest its liability under the Longshoremen's and Harbor Workers' Compensation Act; it voluntarily paid to Palazzolo $2,940 compensation and furnished him with medical

services worth $9,837 (R. 306); it did not require the making of a formal award by the Deputy Commissioner.

Palazzolo, however, availing himself of his rights under Section 33 of the Longshoremen's and Harbor Workers' Compensation Act (*supra*, pp. 3–6), elected to bring suit against Par-Atlantic as the owner of the *Canton Victory* on the ground that the accident had been caused by improper stowage, for which the ship was responsible either on a theory of negligence or of unseaworthiness (Complaint, pars. 5 and 6, R. 8). The ship impleaded Ryan on the ground that if the cargo had been stowed improperly it was Ryan's fault and, since the latter had contracted to load the cargo in a skillful manner, it had to hold the ship harmless from any liability resulting from its violation of its contractual duty (R. 10–13), even in the conceded absence of an express provision for indemnity (R. 316).

A motion for summary judgment dismissing the third-party complaint (R. 21–31) was denied on the ground that there were issues of fact which could be determined only after a trial (R. 31–33).

The trial was held pursuant to a stipulation under which the issues between the plaintiff longshoreman and the ship were to be submitted to a jury, while the issues of fact and law raised by the third-party complaint between the ship and the stevedore were to be determined by the court alone (R. 46–47, 317–318).

The principal factual issue in the main action between the stevedore and the ship was the question of whether the pulp rolls in Hold No. 3 had been secured with wedges, or only with pieces of lumber less than an inch in height (scrap dunnage). The ship's second mate testified that he had generally overseen the loading process at Georgetown, but that he could not watch the stowing of every roll (R. 214, 234–235, 245). In the course of his general supervision of the loading he noticed that the employees of the stevedore were using wedges (R. 251–252, 318). He did not know of a single instance in which the rolls were secured only with scrap dunnage (R. 236, 240, 318); indeed, if he had observed that this had been done, he would have complained to Ryan (R. 251, 260–261, 318). Witnesses for both sides agreed that, once the bottom layer of pulp rolls was put in place, it was impossible to see from above whether it was secured with wedges or scrap dunnage (R. 77, 237).

The plaintiff longshoreman, on the other hand, introduced a substantial amount of evidence to the effect that the rolls had not been secured with wedges, but merely with scrap dunnage about ¾″ thick (see, *e. g.*, R. 66, 94, 127, 276, 318–319). It also appeared that during the unloading of the *Canton Victory* at Brooklyn, Ryan's hatch foreman noticed that the pulp rolls were secured with ¾″ thick dunnage rather than with wedges (R. 276–277), and that, in view of the dangers facing

the unloading longshoremen from this method of stowage, he ordered his crew to find some 4 x 4 or 6 x 6 pieces of lumber in order to fasten the rolls (R. 278–280, 286) but that he did not stop the unloading until such pieces could be found (R. 286).

In the action between the longshoreman and the ship the jury found in favor of the plaintiff in the amount of $75,000 (R. 304) and judgment was entered accordingly (R. 315). The court ordered that out of this judgment the sum of $12,797.36, representing compensation payments of $2,940 and $9,857.36 for medical services furnished to the plaintiff, be first paid to the stevedore's compensation carrier (R. 319–320).

On the other hand, the District Court dismissed the third-party complaint brought by the ship against Ryan. It found that there was sufficient evidence in the record to base the ship's liability to the longshoremen not merely on a breach of its warranty of seaworthiness, "a species of liability without fault" (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94), but also on the ship's negligent failure to discover the dangerous condition of the cargo. (R. 317–319.) The court concluded that this element of negligence rendered the ship and the stevedore joint tortfeasors and defeated the former's right to recover indemnity (R. 319).

The Court of Appeals reversed. It agreed with the District Court that "there was ample evi-

dence to support a jury verdict on either or both negligence or unseaworthiness" (R. 326). It held, however, that the stevedore was obligated by contract to perform the stowage of the pulp rolls in a reasonably safe manner, that it breached this duty when it created the hazardous condition on the *Canton Victory* by the improper stowage, and that respondent's negligence consisted merely in its failure to supervise properly the task undertaken by petitioner (R. 326). In these circumstances the Court of Appeals held that respondent was entitled to indemnity. Neither court discussed the question of the impact, if any, of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act upon the ship's right to indemnity.

INTEREST OF THE UNITED STATES

The United States, as the world's largest shipowner, and therefore one of the largest employers of stevedore-contractors, is deeply concerned with the frequently recurring question raised by this cause, *viz.*, whether a ship which has become liable to a longshoreman as a result of a dangerous condition brought about by his employer's failure properly to perform its contract remains saddled with the loss or whether it can obtain reimbursement from the stevedore whose breach of contract actually caused the injury. Since the United States acts as a self-insurer with respect to many of its vessels, it has an important financial stake

in the resolution of this legal problem. And its interest is far greater than that of most of the litigants in this type of case where, as in the usual instance, a large part of the liability is covered by insurance,[2] or where, as here, the parties are subsidiaries of the same parent corporation, or where both parties might even be insured by the same underwriter as in *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396.

SUMMARY OF ARGUMENT

A longshoreman was injured during the unloading of a vessel. He successfully sued the ship and recovered on the grounds that the ship had been unseaworthy and that the ship's officers had been negligent in failing to discover this condition. In the instant proceeding the ship seeks reimbursement from the stevedoring company on the theory that it had been hired to load and unload the ship in a skillful manner; that the creation of the dangerous condition, which resulted in the injury to the longshoreman and the ship's liability to him, constituted a breach of this contractual undertaking; and that the ship is consequently entitled to reimbursement for the judg-

[2] In view of the circumstance that liability insurance policies now carry $10,000–$20,000 deductible clauses (Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers,* 39 Cornell L. Q. 381, 417), the statement of Lord Scrutton in *Paterson, Zochonis & Co.* v. *Elder, Dempster & Co.,* [1923] 1 K. B. 420, 442, that the real question is which set of underwriters shall bear the loss must now be taken with a certain amount of reserve.

ment it had to pay. The theory under which the ship seeks recovery is contractual, not quasi-contractual.

I

A. 1. It is well established that where the breach of a contract subjects the promisee to liability to a third party, reimbursement—of indemnity as it is frequently called—constitutes an element of the damages to which the promisee is entitled from the promisor. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (C. A.); *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. This liability for reimbursement exists in the absence of an express indemnity agreement (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217) and may be predicated not merely upon the breach of an express term of the contract but also on the implied undertaking to carry it out in a careful and prudent manner. *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. This rule is not restricted to the common law but covers maritime contracts as well. *Mowbray* v. *Merryweather*, *supra*; *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F. 2d 769 (C. A. 9). The ship here is thus seeking to enforce an existing type of remedy; the considerations underlying *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, are accordingly inapplicable.

2. The failure to chock the rolls properly constituted a breach of a contractual duty owed by

the stevedore to the ship and subjected the former to liability for reimbursement. By virtue of the stevedoring contract the stevedore promises the ship to load, stow, and unload its cargo in a safe manner. *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621. He is responsible to the ship if he fails to perform this duty (*The Robert R.*, 255 Fed. 37, 39 (C. A. 2)), which includes the use of proper dunnage (*The Edith*, 10 F. 2d 684, 685; *The Indien*, 71 F. 2d 752, 756 (C. A. 9).

B. 1. The right to obtain reimbursement is not defeated by the ship's failure to discover the dangerous condition created by the stevedore. An expert contractor cannot escape liability for reimbursement on the ground that his customer failed to supervise him properly. The customer's omissions may constitute a breach of a duty owed by him to the injured third person; he owes, however, no such duty to the contractor. *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640; *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237. To the contrary, the customer may rely on the proper performance of the contract by the expert who warrants the skill of his trade. *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474.

2. Similarly, the ship is under no duty to tell the stevedore anything he would know "if [he] knew [his] business" (*Hastorf Contracting Co.* v. *Ocean Transportation Corporation*, 4 F. 2d 583

(S. D. N. Y.), affirmed, 4 F. 2d 584 (C. A. 2)) or to "exercise a high degree of vigilance to see to it that it [the stevedore] performs a plain duty" (*Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886, 887 (C. A. 9)). Thus, it is generally recognized that where a ship has become responsible to a longshoreman as the result of the stevedore's breach of his contractual duty to load, stow, or unload the ship prudently and skillfully, the ship is entitled to be reimbursed even where it was negligent in failing to discover the breach. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co., supra; Rich* v. *United States,* 177 F. 2d 688 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 (C. A. 9); *Read* v. *United States,* 201 F. 2d 758 (C. A. 3); *States S. S. Co.* v. *Rothschild International Stevedoring Co.,* 205 F. 2d 253 (C. A. 9); *Crawford* v. *Pope & Talbot, Inc.,* 206 F. 2d 784 (C. A. 3); *Brown* v. *American-Hawaiian S. S. Co.,* 211 F. 2d 16 (C. A. 3); *Berti* v. *Campagnie de Navigation Cyprien Fabre,* 213 F. 2d 397 (C. A. 2); *McFall* v. *Campagnie Maritime Belge,* 304 N. Y. 314.

The decisions denying reimbursement involved situations where there was no contractual relation between the parties and accordingly no possibility of the breach of a contractual duty (*Slattery* v. *Marra Bros.,* 186 F. 2d 134, 138–139 (C. A. 2)) or where the court found that, although there was a contract, the stevedore had not breached it, *e. g.,* where he justifiably relied on

the soundness of equipment furnished to him by the ship. *American Mutual Liability Co.* v. *Matthews,* 182 F. 2d 323 (C. A. 2).

II

The ship's right to reimbursement, flowing from the breach of an independent duty owed to it by the stevedore, is not curtailed by the exclusive liability provisions of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

A. That the longshoreman was an employee of the stevedore and thus could not sue him (because of Section 5) does not defeat the ship's right to reimbursement. For the latter does not seek a quasi-contractual remedy and, hence, it does not matter that its payment of the judgment would not enrich the stevedore. In actions for reimbursement it is immaterial that the defendant has a personal defense as against the original plaintiff. An employer held vicariously responsible for the tort of an employee may seek reimbursement from the latter in spite of the fact that the victim could not have sued the employee directly (on account of the husband-and-wife or father-and-child relationship). *Schubert* v. *Schubert Wagon Co.,* 249 N. Y. 253; *Koontz* v. *Messer,* 320 Pa. 487; *Jones* v. *Kinney,* 113 F. Supp. 923 (W. D. Mo.). The admiralty field furnishes another example (recovery in a both-to-blame situation).

The Chattahoochee, 173 U. S. 540; *Aktslsk. Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Similarly, the provision of a compensation statute barring suit by the employee against his employer does not foreclose suits for reimbursements against the latter by a third person, based upon the breach of an independent contractual duty owed by the employer to the third party. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175; *Maio* v. *Fahs*, 339 Pa. 180.

B. The ship does not come within the statutory term (in Section 5), "any one otherwise entitled to recover damages." The statute provides that the compensation remedy shall be in place of all other liability of the employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin or *anyone otherwise entitled to recover damages.* Under the customary rules of statutory interpretation, the words "any one otherwise entitled to recover damages" cannot be read without reference to the classes specifically enumerated in the statute. The limitation under the *ejusdem generis* rule of the exclusive remedy provision to relatives and dependents of the employee would not defeat the obvious purpose of the Compensation Act to deal with the relations between the employer and the employee and those dependent upon him, and not with the employer's contractual dealings with third per-

sons. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175; *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946 (C. A. 8).

2. Nor does the ship seek to recover "on account of the employee's injury or death" (the other phrase in Section 5). The ship's claim is based upon the breach of an independent contractual duty owed to it. Its right is not built upon any theory of subrogation to the cause of action which originally belonged to the injured longshoreman (*Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253) and therefore does not derive from the injury to the employee. *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (C. A. 3).

For these reasons, it has been held unanimously by the federal appellate and state courts that the exclusive liability provisions of compensation acts do not curtail third parties' rights to reimbursement based upon the breach of an independent contractual duty. Decisions which hold that the exclusive remedy provision bars recovery actually deny the right to reimbursement for lack of contractual relationship, absence of a breach of duty, or serious wrongdoing by the plaintiff himself. Denial of reimbursement would permit the stevedore to shift to the ship all the consequences of his breach of the duties owed by him to the ship and to the longshoreman. The Act certainly was not designed to have this unexpected effect.

3. Granting indemnity in the present circum-

stances would not be harmful to the employees or otherwise in violation of the general plan of the Compensation Act.

ARGUMENT

This is, in essence, an action by a shipowner against a contracting stevedore to recover damages for breach of contract to load the vessel properly. The ship hired the professional services of the stevedore—a shoreside specialist in shiploading. As a result of the failure of the stevedore to perform his expert job correctly, one of his own employees was injured and succeeded in holding the ship liable in damages. The question is whether the ship can recover the damages occasioned by the stevedore's breach of contract and thereby shift this loss to the stevedore who contracted to stow the cargo safely.

We shall show, first, that the ship is entitled to be reimbursed by the stevedore on the ground that its liability to the longshoreman was a foreseeable result of the stevedore's failure to perform properly the terms of his contract with the ship; second, that this right to be reimbursed is not affected by the ship's failure to check whether the expert whose services it had engaged actually was performing his specialized task properly; and, finally, that the Longshoremen's and Harbor Workers' Compensation Act, designed to deal with the employer-employee relationship, does not affect the duties contractually

assumed by an independent contractor toward the shipowner, a third person who hires his services.[3]

I. A PERSON WHO IS SUBJECTED TO THIRD PARTY LIABILITY AS THE RESULT OF THE IMPROPER PERFORMANCE OF A CONTRACT BY HIS INDEPENDENT CONTRACTOR IS ENTITLED TO BE REIMBURSED FOR HIS DAMAGES BY SUCH CONTRACTOR, AND THIS LIABILITY IS NOT DEFEATED BECAUSE THE PERSON EMPLOYING THE CONTRACTOR FAILED TO DISCOVER THE DANGEROUS CONDITION WHICH THE CONTRACTOR CREATED

A. THE SHIP IS ENTITLED TO RECOVER FROM THE STEVEDORE SINCE THE BREACH OF THE DUTY TO STOW THE CARGO PROPERLY, OWED BY THE STEVEDORE TO THE SHIP, SUBJECTED THE SHIP TO LIABILITY TO THE LONGSHOREMAN

1. *Indemnity, as used in this case, means the right to recover damages resulting from the breach of a contractual duty in consequence of which a liability has been imposed upon the person to whom the contractual duty was owed*

The ship claims its right to indemnity on the basis that it had entered into a contract with Ryan pursuant to which Ryan undertook to stow the ship safely, that Ryan breached his duty, thereby creating a dangerous condition, and that, as a foreseeable result of this breach of duty, the ship had to pay damages to the longshoreman.

In other contexts, indemnity is frequently ex-

[3] The problems presented by this case are discussed in Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. of Pa. Law Rev. 321 (Dec. 1954).

plained on the quasi-contractual theory that (Woodward, *Law of Quasi-Contracts*, p. 409)[4]:

> * * * [where] one tortfeasor pays what in equity and good conscience another tortfeasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust.

This definition, however, does not, and does not intend to,[5] take into account the instances—of at least equal importance—where, as here, indemnity is not sought as a method of shifting the incidence of tort liability but rather as reimbursement for damages suffered as the result of the breach of a duty—usually a contractual duty—owed by the so-called indemnitee to the so-called indemnitor.

Since the turn of the century it has been well established as a matter of general law[6] that such "indemnity" is a proper measure of damages to compensate for losses resulting from a breach of contract. *Mowbray* v. *Merryweather*, [1895] 2

---

[4] See also Keener, *Quasi-Contracts*, p. 408; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 147; *City of Chicago* v. *Robbins*, 2 Black 418; *Robbins* v. *City of Chicago*, 4 Wall. 657; *Washington Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *George's Radio* v. *Capital Transit Co.*, 126 F. 2d 219, 222 (C. A. D. C.); *Restatement of the Law of Restitution*, Secs. 76, 86.

[5] *Restatement of the Law of Restitution*, pp. 328–329; cf. Keener, *Quasi-Contracts*, p. 25.

[6] The stevedoring contract is a maritime contract and as such governed by federal general law. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–62; *American Stevedores* v. *Porello*, 330 U. S. 446, 456.

Q. B. 640 (C. A.), involving a factual situation somewhat resembling the one at bar, contains probably the first discussion of the pertinent considerations. There, a ship had engaged a stevedore to discharge the cargo and agreed to furnish all the necessary cranes, winches, chains, and other equipment needed for that purpose. One of the chains was defective and broke, injuring one of the stevedore's employees. The longshoreman recovered £125 from his employer, who in turn sought to recover this sum from the ship. The Court of Appeal affirmed a judgment for the plaintiff. It held that in the circumstances of the case the ship had given an implied warranty that the chain was sound and that this warranty had been breached. Moreover, it was within the contemplation of the parties that a defect in the chain might result in injury to a longshoreman for which the stevedore would be held responsible. Hence, these damages were not too remote and the stevedore was entitled to be indemnified for the sum to be paid to his employee, and was not limited to nominal damages.

This specific application of the hornbook rule of *Hadley* v. *Baxendale,* 9 Ex. 341, 156 Eng. Repts. 145, was quickly followed in this country: *Boston Woven Hose etc. Co.* v. *Kendall,* 178 Mass. 232 (1901)—quoted with approval by this Court in *Union Stock Yards Co.* v. *Chicago, etc., R. Co.,* 196 U. S. 217, 226–227 (1905)—held, relying on *Mowbray* v. *Merryweather, supra,* that

where the purchaser of a boiler had become liable to third persons as the result of an explosion of the boiler, he was entitled to indemnity from the boiler-maker as damages for breach of warranty. And *Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217 (1903), held that where a contractor had become liable to third persons as the result of the negligent performance of a contract by a subcontractor, the latter was liable to indemnify the former, even where the parties had not expressly stipulated for such indemnity.

The classical exposition of the considerations underlying indemnity of the compensatory type—as contrasted with quasi-contractual indemnity—appears in the opinion of Chief Judge Cardozo in *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253. That case involved the question whether a wife injured by her husband in the course of his employment could recover from his employer although New York law did not permit any suit between husband and wife. Disposing of the argument that if the wife could recover from the employer the latter could, in turn, obtain indemnity from the husband-servant and thus achieve by indirection what could not be done directly, Chief Judge Cardozo said (249 N. Y. at 257):

> We are told that in the long run the consequences of upholding an action against the master may be to cast the burden on the husband, since the master, if not personally at fault, has a remedy over (*Oceanic Steam*

Nav. Co. v. *Compania Trans-Atlantica Espanola*, 134 N. Y. 461; *Wash. Gas Light Co.* v. *District of Columbia*, 161 U. S. 316, 327; *Boston, etc., Co.* v. *Kendall*, 178 Mass. 232). The consequences may be admitted without admitting its significance as a determining factor in the solution of the problem. *The master who recovers over against the servant does not have to build his right upon any theory of subrogation to a cause of action once belonging to the victim of the injury. A sufficient basis for his recovery is the breach of an independent duty owing to himself. The servant owes the duty to the master to render faithful service, and must answer for the damage if the quality of the service is lower than the standard.* (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214.) [Emphasis added.]

Thus, it is now generally recognized that a promise to perform a task includes an undertaking to carry it out in a careful, prudent manner, and where a breach of this duty subjects the promisee to liability toward third persons the former is entitled to reimbursement or indemnity. See, *e. g.*, *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 330; *Wright* v. *Wright*, 229 N. C. 503, 508–509; *Maryland Cas. Co.* v. *Employers Mut. Liab. Ins. Co.*, 208 F. 2d 731, 733 (C. A. 2); *United States* v. *Savage Truck Line*, 209 F. 2d 442, 447 (C. A. 4), certiorari denied, 347 U. S. 952;

Restatement of the Law of Contracts, Section 334;[7] Williston, *Contracts* (Rev. Ed. 1937), Section 1394; Williston, *Sales,* (Rev. Ed. 1948) Section 614 (a); *Restatement of the Law of Restitution,* Part I, Chapter 3, Topic 3, Introductory Note, pp. 328–329, Sections 93–96; *Restatement of the Law of Agency,* Section 401 (c).

Decisions dealing with maritime contracts follow the same pattern. We have already referred to *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640 (C. A.), *supra,* pp. 21–22. Another leading case in this field is *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.,* 10 F. 2d 769 (C. A. 9). A ship repair company having undertaken to repair a ship's valves had failed to put one of these valves back into working condition. As a result, some of the cargo was damaged and the ship was held responsible for the loss. The court held that the ship was entitled to be reimbursed for the "damages which the steamship company had to pay the shipper because of the damaged cargo on account of the defective clapper valves" (10 F. 2d at 772).

It follows from this established rule that in the instant case the ship is entitled to reimbursement if it can show that Ryan breached a duty he

[7] Section 334, Illustration 5 is a paraphrase of *Mowbray* v. *Merryweather,* [1895] 2 Q. B. 640 (C. A.).

[8] Cf. Seavey & Scott's Notes on the *Restatement of the Law of Restitution,* p. 150.

undertook to perform under the stevedoring contract. Moreover, since the ship is pursuing a well-established common-law remedy for "indemnity", the considerations underlying the decision of this Court in *Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282, 285–287, are inapplicable. The *Halcyon Lines* case involved the question whether in a non-collision maritime tort, in which the ship itself had been guilty of serious negligence,[9] the Court should follow the common law rule which prohibits *contribution* among joint tortfeasors, or the admiralty rule which requires it. In the silence of Congress, the Court was unwilling to apply the peculiar admiralty rule in the non-collision field. Here the situation is quite different. The ship does not ask this Court to follow a peculiar admiralty rule; to the contrary, it is the petitioner who asks the Court to depart from well-trodden paths followed generally throughout the entire field of the law and applied both at common law and in the area of maritime law by experienced admiralty judges in this country as well as in England.[10]

---

[9] Cf. *Baccile* v. *Halcyon Lines*, 187 F. 2d 403, 403–404 (C. A. 3).

[10] It has been recognized generally that the *Halcyon Lines* case does not apply where indemnity rather than contribution is claimed. See, *e. g.*, *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784 (C. A. 3); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 328.

2. *The improper stowage of the pulp rolls constituted the breach of a contractual duty owed by the stevedoring company to the ship*

The District Court found that the pulp rolls were improperly stowed because they were chocked with thin pieces of wood rather than with wedges (R. 318–319); the Court of Appeals agreed and stated expressly that "Ryan created the hazardous condition by its improper stowage of the pulp paper rolls at Georgetown" (R. 326–327). And while the ship was held responsible to the original longshoreman–plaintiff on a theory of breach of warranty of seaworthiness and negligent failure to discover the dangerous condition (R. 319, 325–326), as between the ship and the stevedore the latter was exclusively responsible for the proper stowage of the cargo.

A stevedore holds himself out to be an experienced technician engaged in the business of *safely* loading, stowing, and unloading cargo. Cf. *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *The Evelyn*, 282 Fed. 250, 252 (C. A. 2); *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2). Like any other contractor (*supra*, pp. 21–25), he is responsible to the ship if he fails to perform his duties in a reasonable and prudent manner. *The Robert R.*, 255 Fed. 37, 39 (C. A. 2); *Metcalfe* v. *Chiarello*, 294 Fed. 29, 30 (C. A. 2); *The S. C. L. No. 9*, 114 F.

2d 964, 968 (C. A. 3). And the use of proper dunnage is an element of proper stowage. *The Edith,* 10 F. 2d 684, 685 (C. A. 2); *The Indien,* 71 F. 2d 752, 756 (C.A. 9).

The time-honored clauses that the stevedore "act under the captain's orders"[11] or that he perform his task "to the general satisfaction of the mate in charge of the vessel" (R. 214) do not affect the status of the stevedore as an expert independent contractor, or make him a mere agent of the ship. They mean at most that the captain retains responsibility for the stability of the ship,[12] and have no bearing on the details of the work or the methods of stowage. *Gallagher* v. *United States Lines Co.,* 206 F. 2d 177, 179–180

---

[11] *Blaikie* v. *Stembridge,* 6 C. B. (N. S.) 894, 908, 141 Eng. Repts. 703, 709.

[12] *Olsen* v. *United States Shipping Co.,* 213 Fed. 18, 21 (C. A. 2). While it is sometimes said that even where the charterer or stevedore assumes responsibility for loading and that "the duty rests upon the master * * * to see that cargo is properly stowed so that the vessel will be seaworthy" (*Cornec* v. *Baltimore & Ohio R. Co.,* 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621; *Canadian Transport Co.* v. *Court Line, Ltd.* [1940] A. C. 934, 937–938, 952 (H. of L.)), the term "seaworthy" is used here in a narrow sense limited to the "trim and safety of the ship" (*Blaikie* v. *Stembridge,* 6 C. B. (N. S.) 894, 909, 141 Eng. 703, 709, affirmed, 6 C. B. (N. S.) 911, 141 Eng. Rept. 710; *The Catherine Chalmers,* 2 Asp. Mar. Cas. (N. S.) 598), or with reference to dangers caused by "the perils of the seas" (Viscount Finlay dissenting on other grounds in *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.,* [1924] A. C. 522, 539); see also *Oxford Paper Co.* v. *The Nidarholm,* 282 U. S. 681, 684–685. It does not include such other aspects of seaworthiness as the cargo, the crew, or the longshoremen.

(C. A. 2), certiorari denied, 346 U. S. 897; *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621.[13]

In short, the stevedore breached his duty owed to the ship to stow the ship properly and as a result the latter was exposed to liability toward a third party, the longshoreman. The ship accordingly is entitled to indemnity unless this right is defeated by the trial court's finding that the ship was negligent to the extent of failing to discover the dangerous condition caused by the stevedore.

B. THE RIGHT TO REIMBURSEMENT FOR BREACH OF CONTRACT IS NOT DEFEATED BY A FINDING OF FAILURE TO DISCOVER OR TO CORRECT A DEFECT CAUSED BY THE EXPERT INDEPENDENT CONTRACTOR

1. *A contractor cannot defeat a claim for indemnity by urging that his client's reliance on his professed skill constituted negligence*

Petitioner asserts that the ship's claim for indemnity is defeated because it had been held liable to the longshoreman not merely for breach of the warranty of seaworthiness, *i. e.*, without fault (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94),

[13] The stevedore is not even exonerated if he follows improper advice given by the ship. Such instructions are usually considered only suggestions, and if they are faulty, the stevedore, in view of his superior experience, is supposed to disregard them or stop working until the dangerous condition is remedied. *McGeeney* v. *Moran Towing Corp.*, 149 F. 2d 791 (C. A. 2); cf. *The Robert R.*, 255 Fed. 37 (C. A. 2); *Smith* v. *Nicholson Transit Co.*, 39 F. Supp. 795 (W. D. N. Y.).

but also for a negligent failure to discover that petitioner had breached its contract. The negligence consisted, however, merely in the failure to discover the dangerous condition caused by the stevedore and, as between the ship and the stevedore, the former had the right to assume that the latter would carry out its contractual undertakings properly. The stevedore cannot raise the stultifying defense that the customer must keep the most careful check over the manner in which the contractor, hired by him for his expertise, carries out the terms of the contract at the risk of otherwise forfeiting his right to recover for a breach.

If any degree of negligence on the part of the indemnitee could defeat the right to indemnity, that legal remedy would be a rare one indeed, limited to the unusual situation in which liability is imposed without fault or to instances of an express contract of indemnity.[14] But as this Court pointed out in *Union Stock Yards Co.* v. *Chicago, etc., R. R.*, 196 U. S. 217, 228, the typical situation in which indemnity may be awarded is one in which

> * * * [t]he principal and moving cause, resulting in the injury sustained, was the act of the first wrongdoer [the indemnitor]

[14] *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237.

> and the other [the indemnitee] has been held liable to third persons *for failing to discover or correct the defect* caused by the positive act of the other [the indemnitor]. [Emphasis and matter in brackets added.]

While the indemnitee may have violated a duty toward the original plaintiff in neglecting to discover the dangerous condition, he owes no such duty to the indemnitor (*Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640 (*supra*, pp. 21–22)). As Chief Justice Holmes pointed out in *Boston Woven Hose etc. Co.* v. *Kendall*, 178 Mass. 232, 236–237, this failure usually is induced by the very representation of the contractor that he would perform his undertaking properly. Certainly, a customer is entitled to rely to a large degree on the specialized knowledge and expertise of contractors "professing competence and experience" and who warrant the skill of their trade ("*spondentes peritiam artis*"). *H. & C. Grayson* v. *Ellerman Line*, [1920] A. C. 466, 472, 474 (H. of L.).

For these reasons, it is generally recognized that the mere failure to inspect or to discover a dangerous condition does not defeat the right to indemnity, and this is particularly true in those situations where, in view of the contractual relationship between the indemnitor and indemnitee, the latter is justified in relying on the proper performance of the contract by the former. *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*,

10 F. 2d 769, 772 (C. A. 9);[15] *Derry Electric Co.* v. *New England Telephone & Telegraph Co.*, 31 F. 2d 51, 52 (C. A. 1); *Manning Mfg. Co.* v. *Hartol Products Corp.*, 99 F. 2d 813, 814 (C. A. 2); *General Accident, etc.* v. *Goodyear Tire & Rubber Co.*, 132 F. 2d 122, 125 (C. A. 2); *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. 2d 902, 907 (C. A. 9); *Restatement of the Law of Restitution*, Secs. 93, 95, comment a, par. 2; Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. of Pa. Law Rev. 130, 156–158; Note: *Contribution and Indemnity Between Joint Tort Feasors*, 45 Harv. Law Rev. 349, 351–352.

2. *Since the ship owed its duty to discover improper stowage only to the longshoreman and not to the stevedore, its negligence does not defeat the right to indemnity*

The considerations which permit a customer to obtain indemnity from his contractor even where the former was negligent in failing to discover the dangerous condition created by the contractor apply with equal force to the ship-stevedore relationship. We have referred *supra* (p. 27) to the circumstance that the stevedore holds himself out to a specialist. As such "the stevedoring company owes to the vessel and her owners the duty of using due care in the loading; but the

[15] *Supra*, p. 25. The court held that even the discovery of the failure of the repair company to fix one of the valves did not cast upon the ship the duty to assume that other valves were defective (at 772).

vessel and her owners owe no such duty to the stevedoring company." *Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502 (C. A. 4), certiorari denied, 284 U. S. 621. In the words of Learned Hand, J., the ship is under no duty to tell the stevedore anything he would know if he knew his business, such as, *e. g.*, the proper method of stowage.[16] And as there is no requirement that for the stevedore's benefit the ship's officers must "exercise a high degree of vigilance to see that it [the stevedore] performs a plain duty,"[17] a ship which has been held responsible to a longshoreman because of a dangerous condition created by the stevedore in violation of his contractual undertaking is entitled to be indemnified whether or not it might have been negligent itself in failing to discover the defect—and so the lower appellate courts have consistently held. *Seaboard Stevedoring Corp.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886 (C. A. 9); *Rich* v. *United States*, 177 F. 2d 688 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9); *Read* v. *United States*, 201 F. 2d 758 (C. A. 3); *States S. S. Co.* v. *Rothschild Inter-*

[16] *Hastorf Contracting Co.* v. *Ocean Transportation Corporation*, 4 F. 2d 583 (S. D. N. Y., L. Hand, J.), affirmed, 4 F. 2d 584 (C. A. 2); *Red Star Barge Line* v. *Luria Bros. & Co.*, 116 F. Supp. 656 (S. D. N. Y.).

[17] *Seaboard Stevedoring Co.* v. *Sagadahoc S. S. Co.*, 32 F. 2d 886, 887 (C. A. 9).

national Stevedoring Co., 205 F. 2d 253 (C. A. 9);[18] *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 791–794 (C. A. 3); *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16 (C. A. 3); *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 327–331.

The instances in which federal appellate courts have denied indemnity all involved factors which are absent in the instant case. These decisions fall into three general categories. First, where the stevedore did not stand in any contractual relation or other relation to the ship except that of a joint tortfeasor: *Slatteryj* v. *Marra Bros.*, 186 F. 2d 134, 138–139 (C. A. 2). Second, where the ship and stevedore stood in a contractual relationship, but either the stevedore had not been guilty of any negligence (*The Slingsby*, 116 Fed. 227, 228 (E. D. N. Y.), affirmed, 120 Fed. 748 (C. A. 2); *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257 (C. A. 2)) or the ship had furnished defective equipment to the stevedore and the court felt that in the circumstances the stevedore owed no duty to the ship to test it (*American Mutual Liability Co.* v. *Matthews*, 182 F. 2d 323 (C. A. 2[19] *Gill* v. *United States*, 184 F. 2d 49 (C. A.

[18] In that case the stevedore had been hired by a non-demise charterer and not by the ship (205 F. 2d at 255). The court nevertheless held that the stevedore owed the ship a duty to refrain from negligent practices which would subject the ship to liability to third parties.

[19] Note the comment on this decision in Larson, *The Law of Workmen's Compensation*, Vol. II, Section 76.43, pp. 237,

2); *Mikkelsen* v. *S. S. Granville,* 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2) [20]). Finally, where the ship had been guilty of independently culpable acts sufficiently serious to bar full indemnity, *i. e.,* where it would be entitled at most to contribution (*cf. infra,* fn. 37, pp. 47–48) (*Halcyon Lines* v. *Haenn Ship. Corp.,* 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 407–408; *Lo Bue* v. *United States,* 188 F. 2d 800 (C. A. 2); *Union Sulphur & Oil Corp.* v. *W. J. Jones & Son, Inc.,* 195 F. 2d 93 (C. A. 9)).

In the instant case, Ryan was under a contractual duty to the ship to load the rolls prop-

238: "The duty to inspect the rope was a duty only toward his own employee, not toward the third party who furnished the rope. To say that the employer had a duty toward the supplier would be to say that the employer agreed to indemnify the supplier for the results of the supplier's own negligence in furnishing defective rope."

On the other hand, if the stevedore uses defective equipment, furnished to him by the ship, in the knowledge of its defectiveness, he breaches a duty owed by him to the ship and is liable in indemnity, *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 (C. A. 9), and cf. fn. 13, *supra,* p. 29. For a recent analogous decision in the nonmaritime field, see *United States* v. *Savage Truck Line Co.,* 209 F. 2d 442 (C. A. 4), certiorari denied, 347 U. S. 952, where a shipper, which had improperly loaded a truck to the knowledge of the carrier, had been held responsible to third persons injured in an accident caused by the improper loading. The court held that the shipper was entitled to be indemnified by the carrier.

[20] The District Court opinion indicates that the ship had furnished defective equipment to the stevedore. 101 F. Supp. 566, 568–569 (E. D. N. Y.).

erly,[21] and the ship has been subjected to liability to a longshoreman as the result of a violation of Ryan's duty in circumstances in which the ship's sole fault was the failure to discover Ryan's breach of contract.[22] The ship is therefore entitled to indemnity unless, as claimed by petitioner, the Longshoremen's and Harbor Workers' Act operates so as to destroy this contractual remedy between two persons not involved in the employer-employee relationship with which that Act is concerned.

---

[21] While this issue has not been raised directly by the pleadings, it may be pointed out that Ryan additionally breached its contract to discharge the ship safely when it continued the unloading operations after discovering that the rolls were inadequately secured, thus constituting a hazard, and did not await the arrival of wedges with which the cargo could be chocked safely. Cf. p. 29, fn. 13, *supra*; see also *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329 (C. A. 9), certiorari denied, 338 U. S. 904.

[22] Petitioner's Point III asserts that the District Court denied recovery to the ship on the ground that it had been guilty of active negligence and that the Court of Appeals erred in disturbing this finding. The pertinent finding of the District Court was "the cargo officer in the exercise of reasonable care should have discovered and corrected the condition" (R. 319). The Court of Appeals did not disturb this finding of fact (R. 326) but ruled as a matter of law, in accord with applicable precedent (*supra*, pp. 29–34), that this neglect did not defeat the ship's right to be reimbursed.

II. THE SHIP'S RIGHT TO BE INDEMNIFIED FOR THE LIABILITY CAST UPON IT AS THE RESULT OF THE STEVEDORE'S BREACH OF CONTRACT IS NOT DEFEATED BY THE OPERATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

We have shown that under both common and maritime law the ship is entitled to indemnity for the liability to the longshoreman it incurred as the consequence of the breach of the duty owed by the stevedore to the ship. This right to be indemnified has not been curtailed by the operation of the Longshoreman's Act, Section 5 (*supra*, pp. 2–3) of which prevents direct action by the longshoreman against his employer and provides that the compensation remedy shall be exclusive.

A. THE INABILITY OF THE LONGSHOREMAN TO SUE THE STEVEDORE DOES NOT IN ITSELF DEFEAT THE SHIP'S RIGHT TO REIMBURSEMENT FROM THE STEVEDORE

The basis of the stevedore's liability to indemnify the ship is a breach of a contractual obligation, and is not grounded in quasi-contract. The circumstance that the payment of the judgment by the ship does not relieve the stevedore of any liability, and consequently does not enrich him, therefore does not defeat the ship's right to indemnity or reimbursement.

---

[23] At least pro in excess of the compensation liability. Cf. *Baccile* v. *Halcyon Lines*, 187 F. 2d 403 (C. A. 3), reversed on other grounds, *sub nom. Halcyon Lines* v. *Haenn Ship. Corp.*, 342 U. S. 282.

A well known application of this rule is the situation alluded to *supra*, pp. 23–24, where suit is brought against an employer on a theory of vicarious liability in spite of the fact that the plaintiff could not have sued the employee on account of the husband-and-wife or father-and-child relationship. Of the decisions dealing with this problem the majority hold that the inability of the plaintiff to sue the employee does not constitute a bar to a suit against the employer.[24] They are unanimous, however, in holding that, where the employer can be sued in spite of the employee's immunity from direct suit, this immunity does not constitute a bar to an action for indemnity by the employer against the employee, because the latter action is based upon the breach of the independent duty to render competent service.[25] *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257–258; *Chase* v. *New Haven Waste Material Corp.*, 111 Conn. 377, 381–382; *Miller* v. *J. A. Tyrholm & Co., Inc.*, 196 Minn. 438, 442; *Hudson* v. *Gas Consumers' Association*, 123 N. J. L. 252, 254–255; *Wright* v. *Wright*, 229 N. C. 503, 508–509; *Koontz* v. *Messer*, 320 Pa. 487, 492–495;

[24] For the minority rule see fn. 25, *infra*.

[25] Recognizing that to permit the wife or child to sue the employer would be tantamount to exposing the husband or father to indemnity claims of the employer, four jurisdictions have felt this result so undesirable that they bar suits against the employer. *Maine* v. *Maine & Sons Co.*, 198 Iowa 1278, 1281; *Riegger* v. *Bruton Brewing Co.*, 178 Md. 518, 524; *Emerson* v. *Western Seed & Irrigation Co.*, 116 Neb. 180, 185; *Graham* v. *Miller*, 182 Tenn. 434, 441–442.

Briggs v. *City of Philadelphia*, 112 Pa. Super. Ct. 50, 55–57; *Poulin* v. *Graham*, 102 Vt. 307, 310–311; *Hensel* v. *Hensel Yellow Cab Co.*, 209 Wis. 489, 502–504; *Jones* v. *Kinney*, 113 F. Supp. 923 (W. D. Mo.).

The admiralty field furnishes another familiar instance in which a remedy over is permitted in spite of the inability of the original plaintiff to sue the ultimate defendant. In the case of a both-to-blame collision the owner of cargo may be prevented by Section 3 of the Harter Act[26] from recovering damages from the carrying vessel; he may, however, proceed against the non-carrying vessel. When the loss is to be divided between the two ships, the non-carrying vessel may include among its damages the sums paid to the cargo owners of the carrying vessel. As a result, the carrying vessel ultimately bears one-half of the loss to its own cargo because both vessels are at fault, in spite of the fact that the cargo owner could not have proceeded directly against it for its own fault. *The Chattahoochee*, 173 U. S. 540; *Aktslsk. Cuzco* v. *The Sucarseco*, 294 U. S. 394,

[26] Section 3 of the Harter Act (27 Stat. 445, 46 U. S. C. 192) substantially re-enacted as Section 4 of the Carriage of Goods by Sea Act, 49 Stat. 1210, 46 U. S. C. 1304), provides in substance that, if a vessel is seaworthy, neither it nor its owner shall be responsible for damages to the cargo caused by faults or errors in navigation. For a recent discussion of the statute see *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236.

400-401; and see *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236.

It thus appears that the inability of the original plaintiff to sue the ultimate defendant does not constitute *per se* a bar to an indemnity action against the latter.[37] The consequence that economically the employer, by reason of his contractual undertaking, is made to bear a burden which would not be imposed upon him directly by the longshoreman, or that this permits "an encircling movement where a frontal attack * * * is inhibited",[38] does not change the result. As a matter of law, the indemnitee (the ship) bases its claim on the breach of an independent legal duty owed to it. It does not stand in the shoes of the original plaintiff as a subrogee. *Supra*, p. 24. Accordingly, it has been held on the authority of the decisions permitting suits against the husband's employer that the inability of the worker to sue the employer, as provided in workmen's compensation acts, does not by itself bar indemnity claims against the latter. *Westchester Lighting Co.* v. *Westchester County Small Estates Corp.*, 278 N. Y. 175, 180;[39] *Mato* v. *Fahs*, 339 Pa. 180, 190.

---

[37] Chief Justice Hughes pointed out that this liability was imposed in effect as a foreseeable consequence of the maritime tort of collision.

[38] *Emerson* v. *Western Seed & Irrigation Co.*, 116 Neb. 180, 185.

[39] This case interpreting the N. Y. Workmen's Compensation Act, the model of the Longshoremen's and Harbor Workers' Compensation Act (cf., *e. g.*, *Case* v. *Pillsbury*, 148 F. 2d 392 (C. A. 9)), is the leading case in the field and its

B. SECTION 5 OF THE LONGSHOREMEN'S ACT DOES NOT PROHIBIT SUITS FOR COMPENSATORY INDEMNITY

We have shown in the preceding pages that this indemnity action is not foreclosed merely because the Longshoremen's Act prevents the longshoreman from suing his employer. We are concerned in this sub-point with petitioner's contention that Section 5 of the Longshoremen's Act expressly precludes this claim for indemnity.

Section 5 (*supra*, pp. 2–3) provides in pertinent part that the compensation remedy

> * * * shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and *any one otherwise entitled to recover dam-*

---

reasoning has been incorporated in several of the basic decisions interpreting the federal statute. Cf. *Rich* v. *United States*, 177 F. 2d 688, 691 (C. A. 2); *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 (C. A. 2); *Lo Bue* v. *United States*, 188 F. 2d 800, 803 (C. A. 2); *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 790 (C. A. 3); *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314, 331.

[39] We have pointed out, *supra*, p. 38, fn. 25, that in some jurisdictions the circumstance that the original plaintiff could not sue the ultimate defendant directly has been used as a reason for also denying him a remedy against the third party, lest the policy underlying the immunity from direct suit be jeopardized by operation of the rules of indemnity. The Longshoremen's Act, however, far from prohibiting suits against the third party, expressly authorizes them. Section 33 (a). In these circumstances, it may be safely assumed that in the absence of an express provision to the contrary the statute envisages indemnity proceedings of the third party against the employer for breach of the latter's independent duty to the third party.

> *ages* from such employer at law or in admiralty *on account of such injury or death* * * *. [Emphasis added.]

Petitioner takes the position that respondent and its claim come within the statutory terms of (a) "any one otherwise entitled to recover damages," and (b) "damages * * * on account of such injury or death." We submit that neither proposition is correct.

1. *The exclusive remedy provision of Section 5 is limited to the employee and his dependents; it does not apply to persons whose claims are based upon contracts independent of the employment relationship*

Section 5 provides that the statutory compensation remedy shall be exclusive with respect to the liability of the employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, or "any one otherwise entitled to recover damages." The specific categories enumerated by the statute are the employee, his relatives, and his dependents. Petitioner seeks to apply the general words "any one otherwise entitled to recover damages" to a person (like the shipowner) claiming for the breach of a commercial contract unconnected with the employer's dealings with his workers and their families. But under the customary rules of statutory construction the general term "any one otherwise entitled to recover damages" cannot be given a content totally unrelated to the classes

especially mentioned by the statute.[31] Ordinarily, "general terms which follow specific ones [are limited] to matters similar to those specified." *Gooch* v. *United States*, 297 U. S. 124, 128; see also *In re Bush Terminal Co.*, 93 F. 2d 659, 660 (C. A. 2).

In applying the *ejusdem generis* rule, caution must of course be taken not "to defeat the obvious purpose of legislation." *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Alpers*, 338 U. S. 680, 682–683. In the instant case, however, the limitation of the general words "any one otherwise entitled to recover damages" to the employee, his family, and dependents—to the exclusion of those claiming under a contract unrelated to the employment nexus—would accord fully with the normal scope of workmen's compensation legislation. It is generally recognized that these statutes deal with the relationship of the employer with his employees and their dependents and that it is not to be assumed, in the absence of an express indication to the contrary, that they are designed to interfere with the contractual relationships of the employer with third persons. *Westchester Lighting Co.* v. *West-*

[31] "* * * it must be admitted that the entire impression given by the quoted passage [Section 5 of the Act], listing as it does only persons who are directly in the employee's right, is that it did not mean, by adding 'or any one' to open up a new field of immunity applicable to secondary or corollary litigation related to the injury." Larson, *The Law of Workmen's Compensation*, Vol. 2, Section 76.30, p. 235.

chester County Small Estates Corp., 278 N. Y. 175, 179–180;[*] *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946 (C. A. 8); *Baugh* v. *Rogers*, 24 Cal. 2d 200, 214–216; *Lunderberg* v. *Bierman*, 63 N. W. 2d 355, 365 (Minn., 1954). In other words, the scope of Section 5 "is limited to liability of the employer to those entitled to damages from the injury or death of the employee, without any contract relationship to the employer other than the employment." *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 332 (C. A. 9), certiorari denied, 338 U. S. 904.

As we have indicated above, petitioner's liability to respondent is based upon a commercial contract, not on any employment relationship. In these circumstances, respondent does not come within the statutory scope of "any one otherwise entitled to recover damages." Nor does it come within the policy of the statute. The compensation acts, in conferring immunity on the employer from common law suits by the employee and his dependents, did not mean to free the employer from suits by outsiders. The injured employee and his dependents get a substantial *quid pro quo*, in receiving assured compensation payments regardless of fault as a substitute for tort recoveries. The third party has received nothing, and hence should not be held to have given up the valuable contract rights he would have in the

[*] On the profound effect of this decision on the interpretation of the federal Act see *supra*, pp. 40–41, fn. 29.

absence of the statute. It is unfair to bring the third party within the rule of mutual sacrifice when his advantage is to be sacrificed without any compensatory gain.

2. *Since petitioner's liability to respondent is based upon the breach of an independent contractual duty owed to respondent, it is not "on account of such [the employee's] injury or death"*

We have just shown that a party claiming reimbursement on the basis of an independent contract is not "any one otherwise entitled to recover damages" within the meaning of Section 5. This result alone is sufficient to deny the benefit of the statute to petitioner. In addition, the claim for reimbursement is not one "on account of such injury or death." Since the asserted liability is bottomed on an independent contractual duty owed by petitioner to respondent, the latter "does not need to build his right upon any theory of subrogation to a cause of action once belonging to the victim of the injury."[33] He does not stand in the employee's shoes, nor does he seek an equitable readjustment of the incidence of tort liability (*supra*, pp. 20–21).

Accordingly, the courts have recognized that (*Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, 792 (C. A. 3)):

> * * * the indemnitee has a claim which is independent of and does not derive from

[33] *Schubert* v. *Schubert Wagon Co.*, 249 N. Y. 253, 257.

> the injury to the employee, except in a remote sense not within the provisions of Section 5.

The federal appellate courts are in full agreement that a true claim for indemnity, *i. e.*, one based upon the breach of an independent duty, is not barred by Section 5. *United States* v. *Arrow Stevedoring Co.*, 175 F. 2d 329, 332 (C. A. 9), certiorari denied, 338 U. S. 904; *Rich* v. *United States*, 177 F. 2d 688, 691 (C. A. 2); *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9); *Read* v. *United States*, 201 F. 2d 758, 763–764 (C. A. 3); *States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253, 256–257 (C. A. 9); *Brown* v. *American-Hawaiian S. S. Co.*, 211 F. 2d 16, 18 (C. A. 3); and see *McFall* v. *Compagnie Maritime Belge*, 304 N. Y. 314 (interpreting the federal statute).[34]

The decisions which hold that Section 5 or the analogous provisions of a state compensation act defeat the remedy over—discussed in the appendix to petitioner's brief—are all instances where

[34] The decisions interpreting the state compensation acts come to the same result: California: *Baugh* v. *Rogers*, 24 Cal. 2d 200, 206–217; Connecticut: *Farm Bureau Mut. Auto. Ins. Co.* v. *Kohn Bros. Tobacco Co.*, 107 A. 2d 406, 408; Iowa: *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, 953–955; Minnesota: *Lunderberg* v. *Bierman*, 63 N. W. 2d 355, 361–365; New York: *Westchester Lighting Co.* v. *Westchester Small Estates Corp.*, 278 N. Y. 175, 179; *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 220 (C. A. 2); New Jersey: *Yearicks* v. *City of Wildwood*, 23 N. J. Super. 379, 382–383; cf. *Farren* v. *New Jersey Turnpike Authority*, 31 N. J. Super. 356, 106 A. 2d 752, 754.

the courts either failed to find an independent duty owed to the third party by the employer (*i. e.*, where their sole relationship was that of joint tortfeasors[35]), or the employer had not breached any duty he owed the third party,[36] or the third party himself had been guilty of negligence sufficiently serious as to deny him the right to full indemnity.[37] Indeed, numerous decisions

---

[35] *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138–139 (C. A. 2); *Congressional Country Club* v. *Baltimore & Ohio R. Co.*, 194 Md. 533; *Sanchez* v. *Hill Lines*, 123 F. Supp. 42, 43 (D. N. M.) (New Mexico law); *Hunsucker* v. *High Point etc. Chair Co.*, 237 N. C. 559, 566–569; *Peak Drilling Co.* v. *Halliburton Oil Well Cementing Co.*, 215 F. 2d 368, 370–372 (C. A. 10, Oklahoma law); *Buggs* v. *Wolff*, 201 Wisc. 533. *Guse* v. *A. O. Smith Corp.*, 260 Wisc. 493, involved a suit by a wife for loss of consortium, not an action for reimbursement for breach of contract.

[36] In particular, these are the cases where the accident had been caused by defective equipment furnished by the third party to the employer. *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2), and see the discussion of the *Matthews* case in *Slattery* v. *Marra Bros.*, 186 F. 2d 134 at 139 (C. A. 2); *Gill* v. *United States*, 184 F. 2d 49 (C. A. 2); *Mickkelsen* v. *S. S. Granville*, 191 F. 2d 858, rehearing denied, 192 F. 2d 809 (C. A. 2) (see *supra*, p. 25, fn. 20); see also *Spaulding* v. *Parry Nav. Co.*, 187 F. 2d 257 (C. A. 2).

[37] *Lo Bué* v. *United States*, 188 F. 2d 800 (C. A. 2); *Hawn* v. *Pope & Talbot, Inc.*, 198 F. 2d 800, 807 (C. A. 3), affirmed, 346 U. S. 406, 408. *Standard, etc.* v. *Ruckert Ter. Corp.*, 193 Md. 20, holding that Section 5 of the federal statute precluded relief, involved a situation in which apparently the employer owed no independent duty to the third party which in turn was itself guilty of serious negligence. The decision, however, contains a dictum to the effect that Section 5 also bars true indemnity claims. State statutes: *Bankers Indemnity Ins. Co.* v. *Cleveland Hardware & Forging Co.*, 77 Ohio

holding that relief was barred by the exclusive remedy clause have stressed that the ruling would have been to the contrary if there had been an independent contract,[38] or breach thereof.[39]

Thus, the same tests determine whether the ship can recover under the theory of indemnity and also whether it is excepted from the operation of Section 5. If it can show that it is entitled to indemnity, it follows automatically that Section 5

App. 121; *Maio* v. *Fahs*, 339 Pa. 180, 192 (in view of the Pennsylvania contribution statute, the employer was held responsible to contribute up to the amount of his compensation liability).

The third party would not be entitled to *contribution* in this situation. The first element of contribution, *viz.*, a common liability, is missing, because the liability of the employer is based upon the compensation statute and is not dependent upon a tort. *American Mutual Liability Ins. Co.*; v. *Matthews*, 182 F. 2d 322, 323 (C. A. 2); *Lo Bue* v. *United States*, 188 F. 2d 800, 802 (C. A. 2). Apart from this basic difficulty, this Court has indicated its unwillingness in the absence of a statute to depart, in the field of non-maritime torts, from the common-law rule that there cannot be contribution between joint tortfeasors. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 407–408. Moreover, contribution is essentially a tort remedy and would probably constitute a liability "on account of such injury or death" proscribed by Section 5. Cf. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 548.

[38] *Hunsucker* v. *High Point etc. Chair Co.*, 237 N. C. 559, 566, 568; *Peak Drilling Co.* v. *Halliburton Oil Well Cementing Co.*, 215 F. 2d 368, 371–372 (C. A. 10). Cf. *Slattery* v. *Marra Bros.*, 186 F. 2d 134, 138 (C. A. 2).

[39] *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, 324 (C. A. 2); and see, conversely, the admonition upon remand in *Brown* v. *American-Hawaiian Lines*, 211 F. 2d 16, 18 (C. A. 3): "there can be no action of indemnity in these cases which is not based on the violation of some contractual duty."

is inapplicable. Conversely, if it cannot establish a claim for indemnity, it cannot recover at all (*supra*, p. 48, fn. 37). Section 5 does not have a separate role in this type of case.

If the ship could not recover over, the stevedore would be relieved of the entire burden of the accident[40] caused by the stevedore's breach of his contractual undertaking, even in those instances where the stevedore alone is at fault[41] or where, as here, the sole fault of the ship consists in its mistaken assumption that the stevedore would carry out the terms of his contract faithfully.[42]

3. *The inapplicability of Section 5 in indemnity cases does not violate the statutory plan or injure the employee*

Petitioner argues that recovery by the ship would cast an uninsurable liability upon the employer and would encourage the employer to contest employees' claims rather than pay them voluntarily. Neither of these contentions is sound.

a. Petitioner asserts that the policy underlying workmen's compensation legislation, *viz.* that the employer protect itself by insurance from the risks

[40] On analogy to Section 33 (e) (1) (*supra*, p. 4), Ryan's compensation carrier has been reimbursed for all payments made by it (*supra*, p. 10).

[41] *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396; see also *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 100; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 412–413.

[42] This result has been criticized as "profitable negligence." Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 423.

of industrial accidents,[43] would be frustrated if it were subject to this claim for breach of contract which is said to be uninsurable. Initially, the very premise of this argument is fallacious. The employer is held responsible in indemnity not as the result of the employee's injury, but because it improperly performed its contract of stowage entered into with the ship. For all we know, it should be able to obtain insurance for liability imposed upon it for the breach of its stevedoring contracts.

Other stevedore and repair contractors procure such coverage pursuant to contracts with the United States. As a matter of fact, moreover, petitioner is probably protected by its standard compensation policy. The New York Court of Appeals, which holds that the New York Compensation Act does not exclude indemnity, has also held in *Cardinal* v. *State of New York*, 304 N. Y. 400, certiorari denied, 345 U. S. 918, that indemnity is a liability imposed by law[44] and accordingly covered by paragraph One (b) of the familiar form of the workmen's compensation policy.[45]

b. Nor can it be said that the employer's temptation to resist compensation claims would be

---

[43] Cf. Section 32 of the Act.

[44] Cf. *Lo Bue* v. *United States*, 188 F. 2d 800, 803 (C. A. 2), also based on the premise that indemnity is a liability imposed by law.

[45] For the text of this policy, see Larson, *The Law of Workmen's Compensation*, Vol. 2, Appendix E, p. 564.

seriously increased if claims for indemnity were allowed. Petitioner points to Section 33 (b) of the Act pursuant to which the employee must assign to the employer all claims against third parties if he accepts an award, while he retains control over the third-party action if he accepts voluntary compensation payments. It is petitioner's position that the employer would refuse to pay compensation voluntarily and thereby compel the making of an award which would result in the assignment to him of the third-party complaint. Petitioner implies that once the third-party action is assigned to the employer he would not utilize it. This argument, however, does not take into consideration the circumstance that, if the employer recovers against the third party on the assigned claim, he may retain an amount equal to all compensation benefits paid by him or his compensation carrier (Section 33 (e) 1, *supra*, p. 4).

Thus, the stevedore is under a strong motivation to resist voluntary compensation and to obtain an assignment of the third party claim, regardless of the outcome of the present controversy. If indemnity is denied, he may seek to obtain an assignment in order to bring a third party action and thereby cast the entire burden of the accident upon the ship. If it is granted, it is in his interest to sequester the action so as to forestall indemnity.

It should be borne in mind, however, that these considerations are of limited weight. A denial of

the right of indemnity would not put an end to suits by the longshoreman against the ship and thus terminate the entire problem. Section 33 (a) still leaves with the employee the final decision as to whether a third party action is to be brought, and so long as the employee feels that he has a substantial chance to recover a greater sum from the ship he will bring suit in normal course.[46] The employee's decision will not be much affected by whether the recovery is ultimately borne by the employer or by the ship.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court of Appeals for the Second Circuit should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
LEAVENWORTH COLBY,
HERMAN MARCUSE,
Attorneys.

FEBRUARY 1955.

[46] Section 33 (f) (*supra*, p. 5) provides that the employer is required to pay as compensation "a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

U. S. GOVERNMENT PRINTING OFFICE: 1955

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 11 1955
HAROLD B. WILLEY, Clerk

No. 1

In the Supreme Court of the United States

OCTOBER TERM, 1954

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO PETITIONER'S REPLY BRIEF

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC., PETITIONER

v.

PAN-ATLANTIC STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO PETITIONER'S REPLY BRIEF

Petitioner's reply brief contains a number of contentions which, as we believe, require a brief answer.

1. Petitioner argues that the statutory clause "anyone otherwise entitled to recover damages from such employer . . . . on account of such injury or death" must be construed as defeating the ship's claim to be reimbursed for the breach by the stevedoring company of its agreement to stow the ship properly because otherwise the statutory

clause would not have any meaning whatever. We submit, basically, that the clause probably was inserted by the draftsman out of superabundance of caution, to cover the contingency that the statutory enumeration of "employee, his legal representative, husband or wife, parents, dependents, next of kin" may possibly have omitted some member of the class of relatives and dependents the act intended to bar from suit, and, possibly, also in order to cover subrogation claims.[1] If the clause had any concrete legislative purpose going beyond those limits, we submit that it was never intended to go as far as "to open up a new field of immunity applicable to secondary or corollary litigation" (Larson, *The Law of Workmen's Compensation*, Vol. 2, Section 76.30, p. 235) and to defeat independent contractual obligations. It is significant that the lower federal and the state courts agree with our position and that of respondent on this issue. See our main brief, pp. 43-44.

In any event, as we have shown on pages 45-46 of our main brief, the ship does not come within the second branch of the clause. It does not claim "on account of such [the employee's] injury or death", but solely on account of the breach of its agreement.

With respect to Chief Judge Crane's dissent in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N. Y. 175, 180-185, we wish to point out that no other member of the court

[1] E.g., of the type raised in *Standard etc. v. Ruckert Ter. Corp.*, 193 Md. 29, *infra*.

joined his dissent and that no other appellate court, confronted with the problem, has held that it was "mere sophistry" to construe a compensation statute as not designed to interfere with the liability of the employer to third persons for breach of an independent contractual duty.

The decision in *Standard etc.* v. *Ruckert Ter. Corp.*, 193 Md. 20, did not involve the issues here presented. An employee of Ruckert was injured on a vessel. After he had sued the ship, the latter impleaded Ruckert on the ground that Ruckert had failed to provide its employee "with a safe place to work and to instruct him as to a safe manner in which to perform his duties" (193 Md. 20, 23). Indemnity, accordingly, was sought on the basis of the breach of a duty owed by the employer to the employee, not to the indemnitee. This in effect was a subrogation claim "on account of the employee's injury" and thus barred by the statute. Aside from its dictum, that decision has no bearing on a claim for indemnity based on the breach of an independent contractual duty owed by the employer to the third person.

2. Petitioner points to the supposed anomaly that, if indemnity in the form of damages for breach of contract would be awarded in the instant case, the stevedore's total liability would be lower if he were solely negligent than if his negligence concurred with that of the ship. Assuming that such an "anomaly" exists, it would be no different from the one discussed by this Court in *United States* v. *Atlantic Mutual Ins. Co.*, 343 U. S. 236,

241, with respect to liability for cargo damage. There, it was pointed out that in a collision case the ship solely responsible may be exempted from liability for damage to the cargo carried by it, while it may ultimately bear one half of the loss in a both-to-blame situation (cf. the discussion in our main brief at pp. 39-40).

Actually, however, the stevedoring company would not necessarily be immune from indemnity claims when it is solely at fault. In many instances the sole negligence of the stevedoring company will make the ship unseaworthy; this in turn will make the ship responsible to the longshoreman,[2] and give rise to an indemnity claim. We cannot perceive of any policy consideration why reimbursement should be denied in such a situation. Indeed, we believe that when this Court authorized suits against the ship for unseaworthiness, where that condition was caused by the sole fault of another person, it held by implication that the ship could obtain reimbursement from the true wrongdoer, especially if the creation of the unseaworthy condition also constituted the breach of a contractual undertaking owed by the latter to the ship.

3. On pages 8-10, petitioner advances the theory that indemnity is not granted as damages for a breach of contract but only on the basis of the tort principles of comparative negligence. This thesis is the very inverse of the careful analysis of this problem by *Learned Hand*, J., in *Slattery* v. *Marra*

[2] *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396.

Bros., 186 F. 2d 134, 138-139, (C. A. 2), on which petitioner itself relies so heavily. In the *Slattery* case, Judge Hand stressed (p. 138-139) that the shipowner can bottom his recovery only on the breach of a duty—usually contractual—owed to him. He expressly refused to grant indemnity on a theory of comparative negligence between two parties whose sole relationship was that of joint tort feasors; he even characterized this tort type of "indemnity" (in contrast to reimbursement for breach of contract) as an "extreme form of contribution."[3]

4. The purpose of the complicated express indemnity clauses (cf. pp. 10-11 of petitioner's reply brief), frequently embodied in stevedoring agreements (cf. *American Stevedores* v. *Porello*, 330 U. S. 446), is of course to alter the liability the law imposes in their absence by increasing or diminishing it.

5. As *amicus curiae*, we are not directly concerned with the last point raised by petitioner on pp. 11-12 of its reply brief. Nevertheless, we submit that the Court of Appeals had authority to reexamine the issue whether the finding of negligence made by the district court, *i.e.*, the failure to discover a dangerous condition, did as a matter of law defeat recovery for a breach of the undertaking to

---

[3] For a detailed analysis of the *Slattery* opinion, see Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers*, 103 U. of Pa. Law Rev. 321, 336-342 (1954).

stow the cargo competently (cf. our main brief, p. 36 fn. 22).

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH 1955

☆ U. S. GOVERNMENT PRINTING OFFICE 1955 933808 — 1184

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1954.

No. 157.

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

JOHN J. BURNS,
Counsel for Amicus Curiae, American Merchant Marine Institute, Inc.,
40 Wall Street,
New York City 5.

Of Counsel:
ALBERT E. RICE,
New York, N. Y.
T. E. BYRNE, JR.,
Philadelphia, Pa.

International, 236 Chestnut St., Phila 6, Pa.

IN THE

Supreme Court of the United States.

October Term, 1954.

No. 157.

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

Motion of American Merchant Marine Institute, Inc. for Leave to File a Brief Amicus Curiae.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The American Merchant Marine Institute, Inc. respectfully applies to this Court for leave to file a brief as an *amicus curiae* in the above entitled action. Respondent has consented to the applicant's filing of a brief *amicus*. Petitioner has refused consent.

The fundamental question presented by the present petition concerns the right of a steamship company to recover from a contracting stevedore, by an action for indemnity, those damages which the steamship company may be compelled to pay to a longshoreman injured because of

a condition negligently created by his own stevedore-employer.

Interest of American Merchant Marine Institute, Inc.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. Its members include 65 steamship companies which operate dry cargo and passenger vessels, colliers and tankers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately owned American-flag merchant marine now operating in our foreign and domestic trades.

The problem which is presented in the present petition for certiorari is of extreme importance to your applicant and its member companies. Very substantial sums are at stake in cases already pending which involve this problem, and it goes without saying that additional sums can be expected to be at stake in a multitude of similar instances in the future. It is true that some of these potential losses are insured. However, others must be borne by the steamship companies. In any event, all marine insurance rates are calculated directly upon the basis of losses incurred. Hence this Court's decision in the present case will inevitably have a direct and important bearing upon the operating costs of American steamship companies and consequently upon their ability to compete in the world market.

Reasons for Submission of Brief.

Counsel for your applicant have spent a substantial amount of time in studying all available documents in the instant case as well as the relevant authorities. On the basis of such study, and as a result of conferences between counsel for your applicant and respondent's counsel, your applicant has reason to believe that certain questions of law which are relevant to the issues herein, and may ultimately be deemed to be of controlling importance, will not be covered in respondent's brief.

Your applicant is informed that respondent's argument will be addressed primarily toward the proposition that the shipowner's right of indemnity derives from, and is supported by, the contractual relationship which existed between the parties to this particular case. By way of supplementing this argument, and perhaps furnishing a broad background for its applicability, your applicant believes it will be of value to this Court if it be permitted to discuss in a brief those fundamental principles of law which govern the right of one liable without fault to recover indemnity from another whose fault has produced the injury. These points will not, we understand, be covered in the briefs of the parties.

The decision of this Court in the present case will represent a significant addition to the general maritime law. Your applicant is mindful that in the past, this Court has added to this body of law principles which deviate in some instances from those applicable to the shoreside law in similar controversies. We do not urge that symmetry is a necessary end, in and of itself. Concededly there are situations in which dissimilarity is justified, perhaps even compelled by varying circumstances. However, your applicant desires to demonstrate in a brief that there are well-established principles of law (which incidentally have heretofore been recognized by this Court even in cases arising under the maritime law) which are of importance and may well be deemed controlling in the present instance; and that they support the award of indemnity in this case. Moreover, your applicant desires to demonstrate that in the setting of this controversy, there is no valid reason why there should be any departure from these principles simply because the tort herein was committed upon navigable waters. These subjects, we are advised, the respondent does not propose to discuss in its brief.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining respondent's proposed argument.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN MERCHANT MARINE INSTITUTE, INC.

JOHN J. BURNS,
Counsel for Amicus Curiae, American Merchant Marine Institute, Inc.;
40 Wall Street,
New York City 5.

Of Counsel:

ALBERT E. R[illegible]E
T. E. BYRNE, JR.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 4 1955
HAROLD B. WILLEY, Clerk

IN THE

United States Supreme Court

OCTOBER TERM, 1954

No. 427

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

SIDNEY A. SCHWARTZ
Counsel for Petitioner
76 Beaver Street
New York 5, New York

TABLE OF CONTENTS

	PAGE
Introduction	1
Grounds for Rehearing	2
Certificate of Counsel	7
APPENDIX	
Exhibit A	9
Exhibit B	11
Cases Pending in United States District Court, Eastern District of New York	13
Cases Pending in United States District Court, Southern District of New York	18

TABLE OF CASES CITED:

Baltimore & Ohio R. Co. v. Kepner, 313 U. S. 542	4
Bernard v. Johnson, 313 U. S. 537	4
Berti v. Compagnie, 213 F. 2d 397	5
Bruice's Juices v. Adm. Can Co., 327 U. S. 758	4
Commercial Molasses Corp. v. N. Y. Tank Barge Corp., 313 U. S. 541	4
Lisenba v. California, 313 U. S. 537	4
MacGregor v. Westinghouse, 327 U. S. 758	4
Mayor of New York v. Miln, 8 Peters 120	4

PAGE

N. Y. Chicago & St. L. R.R. Co. v. Frank, 313 U. S. 538 4

Reitz v. Mealey, 313 U. S. 542 4

Toucey v. N. Y. Life Ins. Co., 313 U. S. 538 4

IN THE

United States Supreme Court

OCTOBER TERM, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

—v.—

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

Petitioner, Ryan Stevedoring Co., Inc., respectfully presents this, its petition for rehearing, in the above entitled matter, and, in support thereof, presents the following:

Introduction

Petitioner was the employer of a longshoreman, Frank Palazzolo, who on July 20, 1949 was injured aboard a vessel of respondent during its discharge at the port of New York. To recover pecuniary damages for such injuries, Palazzolo brought an action against Pan-Atlantic Steamship Corporation, respondent herein. The respondent impleaded petitioner as a third party defendant and sought full indemnity.

From a judgment in favor of Palazzolo against respondent and in favor of petitioner dismissing respondent's third party complaint (111 F. Supp. 505), respondent ap-

pealed to the United States Court of Appeals, Second Circuit. Said Court, in an opinion reported in 211 F. 2d 277, affirmed the injured longshoreman's judgment against respondent and reversed the judgment which denied indemnity to respondent.

Ryan's petition for certiorari was granted by order of this Court filed October 14, 1954 (R. 329). It would appear that all Justices of the Court participated.

Oral argument was had on March 3 and 4, 1955 before a bench composed of eight Justices, there being a vacancy due to Mr. Justice Jackson's death.

A judgment of affirmance by an equally divided Court of eight Justices was entered on April 11, 1955 with the notation that Mr. Justice Harlan took no part in the consideration or decision of the case. The following are, it is respectfully submitted, the petitioner's

Grounds for Rehearing

1. Petitioner assumes that the tremendous public (the entire shipping industry) interest in the questions which were presented by its petition for certiorari was one of the reasons for this Court's grant of certiorari by order filed October 14, 1954. The fact that (a) the National Association of Stevedores,[1] representing 150 stevedoring firms operating in 39 ports of the United States, (b) American Merchant Marine Institute, Inc.,[2] representing 65 steamship companies or 60% of the privately owned American-flag merchant marine, and (c) The Association of American

---

1 Motion to file brief as *amicus* denied by order of this Court filed Oct. 14, 1954.

2 Motion to file brief as *amicus* denied by order of this Court filed Feb. 28, 1955.

Shipowners, representing other United States flag shipping companies operating in the coastwise, intercoastal and foreign trades, sought leave to file briefs *amici curiae* to show the importance of the question and their views of the law demonstrates the tremendous importance of the questions presented and the impact this Court's decision on the questions presented will have on the entire shipping industry.[3]

The Solicitor General's letter to the Clerk of this Court advising of the intentions of the Government to file a brief as *amicus curiae* respecting the questions raised by petitioner stated:

> "The determination of these issues is of great interest to the United States, which is the world's largest shipowner and which acts as self insurer with respect to many of its vessels."

Indeed, the Solicitor General's office, having been granted leave by order of this Court filed February 28, 1955, presented oral argument on March 3, 1955 in support of the contentions of respondent.

Because of the tremendous importance to the Maritime Industry of the questions presented by petitioner,[4] to say nothing of the importance of a determination for the guidance of the United States District Courts and the Courts of Appeals, a rehearing is, petitioner respectfully urges, eminently desirable. This case commends itself, we most humbly submit, to a rehearing since at the time of the original hearing of March 3 and 4, 1955, there was a

---

3 Motion to file brief as *amicus* denied by order of this Court filed March 7, 1955.

4 It is familiar learning now that an equal division of this Court settles no principle presented for consideration. *Etting v. The Bank of the United States*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419.

vacancy which has now been filled by Mr. Justice Harlan and it may reasonably be expected that a rehearing by a full bench would result in a final determination. In this connection, the Court is respectfully referred to:

Mayor of New York v. *Miln*, 8 Peters 120; 33 U. S. 120;
Bernard v. *Johnson*, 313 U. S. 537, 597;
Lisenba v. *California*, 313 U. S. 537, 597;
Commercial Molasses Corp. v. *N. Y. Tank Barge Corp.*, 313 U. S. 541, 596;
N. Y. Chicago & St. L. R.R. Co. v. *Frank*, 313 U. S. 538, 596;
Toucey v. *N. Y. Life Ins. Co.*, 313 U. S. 538, 596;
Baltimore & Ohio R. Co. v. *Kepner*, 313 U. S. 542, 597;
Reitz v. *Mealey*, 313 U. S. 542, 597.

Petitioner appreciates full well that the granting of a petition for rehearing rests in the sound discretion of the Court. The tremendous importance to one of the foremost industries of our country of obtaining a resolution of the questions presented by petitioner in its petition for certiorari merits rehearing—this, especially where there is an equally divided Court and a Justice available for rehearing who did not participate in a consideration of the case or in a decision thereof. (Cf. *Bruice's Juices* v. *Am. Can Co.*, 327 U. S. 758; 327 U. S. 812, 330 U. S. 743; *MacGregor* v. *Westinghouse*, 327 U. S. 758, 327 U. S. 812; 329 U. S. 402.)

2. The first two questions[5] that were presented to this Court by petitioner are present in hundreds, if not indeed,

---

5 Said questions were as follows:

(1) Is a contracting stevedore, who complies with the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, §901 *et seq.*, insulated under the very

thousands, of pending cases in the federal and state Courts. Indeed, as the United States Court of Appeals for the Second Circuit said in *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397, 398:

> "This appeal involves the *recurring problems* of liability of a vessel owner to an injured employee of the stevedore it has hired to load or unload the vessel and of the liability of the stevedore for indemnity to the vessel owner." (Italics supplied.)

Surely, the questions which permeate all litigation of the type here involved where the parties are aligned as they are should be resolved by this Court. Especially we submit should this be so where the judicial energy of this Court has been expended and its time consumed in considering the petition for a writ of certiorari, hearing argument upon the issues after granting certiorari, considering the same in conference, and arriving at a decision, albeit by an equally divided Court. This Court, on this application for a rehearing, is being asked not to concern itself with the particular litigants involved but to settle the law between man (shipowner) and man (stevedore-employer). That there is a need for the same cannot be gainsaid.

To obtain a statement of the pendency of the many cases in which the principles of law, sought to be decided in the instant matter, are involved, counsel for petitioner

---

wording of the Act (§905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore?

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tortfeasors in a non-collision case, i.e., a personal injury action?

wrote to Chief Judge Inch of the United States District Court for the Eastern District of New York. Petitioner's counsel's letter is printed in the Appendix hereto and marked Exhibit A. Chief Judge Inch's reply thereto is printed in the Appendix hereto and marked Exhibit B.

A fair reading of the same will show, in petitioner's opinion, the need and desirability of obtaining a determination of the questions of law posed by petitioner. The original letter of Chief Judge Inch will be submitted to the Clerk of this Court simultaneously with the filing of this petition.

Petitioner's counsel went further. He caused a search to be made by his office of the dockets of the United States District Courts for the Southern and Eastern Districts of New York.

A search of the dockets of the said Courts shows the following:

(a) There are at least *64* cases pending on the admiralty and law side of the United States District Court for the Eastern District of New York where indemnity, implied in law, is sought from an employer by a shipowner, who has been sued by the third party defendant's employee.

(b) There are at least *53* cases pending on the admiralty and law side of the United States District Court for the Southern District of New York of the type referred to in subdivision (a) above.

Petitioner has set forth a listing of the pending cases in the aforesaid Districts in the Appendix hereto.

There can be no question, petitioner submits, that the determination of the questions presented by petitioner is of significant importance in the administration and handling of this type of litigation by the lower federal Courts.

If the questions posed by petitioner, are left undecided, as they now are, the judicial energy and consideration of this Court has gone for naught in that another case of the type here involved will, it is to be assumed, be presented to this Court in the near future. In the interim, the lower federal Courts' (and also the State Courts') energy and time will have to be expended in the matters pending therein and in those matters yet to be instituted in order to find a solution to the troublesome questions with which this Court has wrestled. Irrespective of the results arrived at by the District Courts, the Courts of Appeals will be confronted again and again with the questions which have been presented to this Court by the petitioner.

Wherefore, your petitioner respectfully prays that its petition for rehearing be granted and upon further consideration that the judgment of the Court below be reversed to which end this petition is

Respectfully submitted,

SIDNEY A. SCHWARTZ,
Counsel for Petitioner,
Ryan Stevedoring Co., Inc.

May 2, 1955.

Certificate of Counsel

I, SIDNEY A. SCHWARTZ, counsel for the above-named petitioner, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

SIDNEY A. SCHWARTZ
Counsel for Petitioner.

APPENDIX

Exhibit A

April 14, 1955

Honorable Robert A. Inch
United States District Court Judge
United States District Court
Eastern District of New York

Re: Ryan Stevedoring Co., Inc.
vs. Pan-Atlantic Steamship
Corporation
No. 157, October Term
Supreme Court, United States

Honorable Sir:

As your Honor knows, the Supreme Court of the United States on April 11, 1955 by an equally divided Court affirmed the judgment of the United States Court of Appeals for the Second Circuit in the captioned matter.

By virtue of the equal division of the Court, with Mr. Justice Harlan taking no part, there is no determination respecting (1) the U. S. Longshoremen's & Harbor Workers' Compensation Act being a bar to a claim of indemnity or (2) the existence of a right of indemnity under the General Maritime Law in a personal injury case of the kind involved in the captioned matter, where the employer has been impleaded by the shipowner who has been sued by the injured longshoreman.

It is my understanding that there are many cases pending in the United States District Court for the Eastern District of New York where the parties are aligned as they

are in the *Ryan* case and where the same questions exist as has been outlined above.

I understand further that the trial of several of these cases, pending in your Court, has been adjourned to await the decision of the Supreme Court in the *Ryan* case—this, on the assumption that the decision will determine the rights, if any, of shipowners against stevedore contractors in a situation of the kind present in the captioned matter.

I contemplate petitioning for a rehearing with the hope that the Supreme Court of the United States will grant rehearing and determine by a full bench the various questions which have been presented by the petitioner.

In order that I may make a proper statement to the Court of the existence of many cases of the type here involved and of the desirability of the question being finitely determined, I am writing to you to obtain a statement as to the pendency of such cases in your Court.

I would appreciate being authorized by you to use your reply in whatever way I see fit.

Respectfully yours,

SIDNEY A. SCHWARTZ

SAS:JH
6062

Exhibit B

April 15, 1955.

Mr. Sidney A. Schwartz
76 Beaver Street
New York 5, N. Y.

Re: Ryan Stevedoring Co. Inc. vs. Pan-Atlantic Steamship Corporation
No. 157, October Term Supreme Court, United States

Dear Mr. Schwartz:

I am in receipt of your letter of April 14, 1955.

You are correct in your understanding that there are presently pending in this Court many cases of the type which you refer to in your letter. In said cases the parties are aligned as they are in the captioned matter, viz., injured longshoremen suing a shipowner and the shipowner impleading the longshoremen's employer and seeking indemnity in the absence of any contract.

The trial of various cases which are pending in this Court has been deferred heretofore to await the decision of the Supreme Court of the United States in your *Ryan* case.

It would be, indeed, most helpful to this Court and, in my opinion, to other District Courts, if the Supreme Court of the United States would find it possible and convenient to finally determine the questions that have been presented in the petition of Ryan Stevedoring Co., Inc., in the captioned matter. A determination of said questions would facilitate the disposition of many cases by way of

settlement or by trial, and such determination would obviate possible appeals in those matters yet to be tried.

You are authorized to use this letter as you see fit.

Very truly yours,

ROBERT A. INCH
Chief Judge,
U. S. District Court

CC sent to:
Fink & Frank, Esqs.
Gay & Behrens, Esqs.

Cases Pending in United States District Courts, Southern and Eastern District of New York

IN EASTERN DISTRICT

ADMIRALTY:

(1) Adm. 18381 — Russo v. U. S. A. v. Universal Terminal & Stevedoring Co., Inc.

(2) Adm. 19976 — Cicolello v. Jacob. Dampsibskliesel-skabt Broduce v. Universal Terminal & Stevedoring Company, Inc.*

(3) Adm. 20212 — Campbell, as Administrator v. U. S. A. v. Monti Marine Corporation

(4) Adm. 19501 — Chiaromonte v. U. S. A. v. American Stevedores, Inc.*

(5) Adm. 20031 — Gaglione v. Den Norske Afrika Og Australieline v. Atlantic Stevedoring Co., Inc.

(6) Adm. 20126 — Vitale v. U. S. A. v. Imperato Stevedoring Corporation*

(7) Adm. 20133 — Bockheld v. U. S. A. v. Monti Marine Corp.

(8) Adm. 20154 — Scotto v. A/S D/S Uvendborg, J. D/S AF 1912 A/S v. Sottnek Co., Inc.

(9) Adm. 20160 — Hansen v. U. S. A. and Erie Basin Works, Inc. v. Banks Ship Rigging Co.*

---

1. Legend * after name of case indicates two causes of action in impleading petition or third party complaint—(1) indemnity being sought on express contract of indemnity and (2) indemnity being sought as implied in law.

(10) Adm. 20177	Danetra v. U. S. A. v. American Stevedores, Inc.*
(11) Adm. 20176	Croce v. U. S. A. v. Bethlehem Steel Co.*
(12) Adm. 20175	Thomson v. U. S. A. v. Todd Shipyards Corp.*
(13) Adm. 20174	Puleo v. Universal Oil Carriers, Inc. v. Jarka Corporation
(14) Adm. 20181	Latus v. U. S. A. v. Todd Shipyards Corporation*
(15) Adm. 20179	Carbonaro v. U. S. A. v. Imperato Stevedoring Corp.*
(16) Adm. 20305	Reed v. U. S. A. v. Turner & Blanchard and Nacirema Operating Corp.
(17) Adm. 20291	Martucci v. U. S. A. v. Imperato Stevedoring Corporation*
(18) Adm. 20254	Phelan v. U. S. A. and American Hawaiian Steamship Company v. Sealand Dock & Terminal Corp. and Federal Stevedoring Co., Inc.
(19) Adm. 20252	Daley v. U. S. A. v. Atlantic Basin Shipyard, Inc.*
(20) Adm. 20235	Lucera v. U. S. A. v. Ira S. Bushey & Sons, Inc.*
(21) Adm. 19788	Leonilus v. Den Norske Muddekhauslinge A/S v. Pittston Stevedoring Corp.
(22) Adm. 19815	Lipari v. A/S Ludwig Mowinkels Rederi v. Commercial Stevedoring Co.
(23) Adm. 19806	Moore v. SS American v. Seaboard Machinery Corp. and The Jarka Corp.

(24)	Adm. 19820	Peduto v. U. S. A. v. Pittston Stevedoring Corp.*
(25)	Adm. 19877	Meyer v. U. S. A. v. Atlantic Basin Shipyard, Inc.*
(26)	Adm. 19884	Capodoro & Lavadera v. Westfall Larsen & Co., A/S et al. v. Universal Terminal & Stevedoring Company
(27)	Adm. 19892	Marino v. Jacob Kjode A/S v. Daniels & Kennedy, Inc.
(28)	Adm. 19882	Meglio v. United States Lines, Inc. v. Pittston Stevedoring Co.
(29)	Adm. 20006	Migliaccio v. Skibsaktieselskabet Karabien, et al. v. The Jarka Corporation
(30)	Adm. 20012	Aleixo v. Den Norske Afrika Og Australielinie, et al. v. Atlantic Stevedoring Co., Inc.
(31)	Adm. 20032	Todaro v. Hayland v. Atlas Stevedoring Corp.
(32)	Adm. 20042	Brunese v. M/S Sonnaverd v. Pittston Stevedoring Corporation
(33)	Adm. 20055	Dorvetti v. M. S. Trein Maersk, et al. v. Jules S. Sottnek Co., Inc.
(34)	Adm. 20084	Poggi v. U. S. A. v. Imperato Stevedoring Corporation*
(35)	Adm. 19923	Crupi v. U. S. A. v. American Stevedores, Inc.*
(36)	Adm. 19924	Guirato v. U. S. A. v. American Stevedores, Inc.*
(37)	Adm. 19943	Pedersen v. The Tanker Bucklube v. Todd Shipyards Corporation*

(38) Adm. 19980 Borgerson v. Skibs A/S Abu v. Sigurd Golten Machine Corporation

(39) Adm. 19985 Lyon v. U. S. A. v. Project Construction Corporation*

(40) Adm. 19995 Greenberg v. U. S. A. v. Fred Beattie Repair Corporation*

(41) Adm. 19166 Solla v. Steamship Nyhaug and A/S Atlas v. The Jarka Corporation

(42) Adm. 19622 Louis v. U. S. A. v. Atlantic Basin Shipyard, Inc.*

(43) Adm. 19692 Licata v. International Freighting Corporation, Inc. v. Nessa Corporation

(44) Adm. 19708 Gaston v. U. S. A. v. Hinzmann & Waldmann Marine Corp.*

(45) Adm. 20248 Ran v. U. S. A. v. Maher Stevedoring Corp.*

CIVIL:

(46) C 15155 Renaldi v. Standard Fruit & Steamship Co. v. John W. McGrath Corp.

(47) C 14818 Walby v. Skibs A/S Victoria v. Marra Bros., Inc.

(48) C 14840 Smith v. OSK Lines v. Federal Stevedoring Co., Inc. and Sealand Dock & Terminal Corporation

(49) C 14886 Barbera v. Mitsui Steamship Co., Ltd. and International Terminal Operating Co., Inc.

(50) C 14956 Ruggiero v. Anchor Line, Ltd. v. Bay Ridge Operating Company, Inc.

(51) C 14963 Francis v. Ellerman Lines, Ltd. v. J. W. McGrath Corp.

(51) C 14652 Sczesney v. Waterman Steamship Corp. v. Federal Stevedoring Co., Inc. and Sealand Dock & Terminal Corp.

(53) C 14682 Dennis, Perretta, Borgailo v. Luckenbach Steamship Company, Inc. v. Turner & Blanchard, Inc.

(54) C 14060 Cruz v. Marine Transport Lines, Inc. v. Bethlehem Steel Co.

(55) C 14256 Rohl v. Orion Shipping & Trading Corp. v. Weyerhauser Steamship Company & Nacirema Operating Co., Inc.

(56) C 14466 Di Costanzo v. Mitsui Line v. Jarka Corporation

(57) C 13434 McEwan v. Skibs A/S Glittre v. Sigurd Golten Machine Corp.

(58) C 12619 Wank, as Administratrix v. Universe Tankships, Inc. v. Pyrate Tank Cleaners, Inc.

(59) C 10955 Berti v. Compagnie Fabre v. American Stevedores, Inc.

(60) C 11674 Raffa v. Waterman Steamship Corporation v. The Jarka Corporation

(61) C 11736 Russello v. Luckenbach Steamship Company, Inc. v. Turner & Blanchard, Inc.

(62) C 13332 Stromme v. Skibs A/S Glittre v. Sigurd Golten Machine Corp.

(63) C 12070 Skowronski v. Waterman SS v. Ryan Stevedoring

(64) C 13329 Swiggers v. Waterman SS v. Ryan Stevedoring

IN SOUTHERN DISTRICT

ADMIRALTY:

(1) Ad., 159-129 Salgado v. United States v. Turner & Blanchard

(2) Ad. 174-178 Ferrara v. A/S Sobral v. Nessa Corporation*

(3) Ad. 175-280 Mancini v. Marine Fuel Transfer Corp. v. Oil Tank Cleaning Corp.

(4) Ad. 180-10 Balbach v. United States v. McGrath Corp.

(5) Ad. 180-269 Sullivan v. United States v. Kane Ship Repair*

(6) Ad. 182-246 Seneger v. United States v. McGrath Corp.

(7) Ad. 182-323 Coleman, et al. v. United Fruit v. McGrath Corp.

(8) Ad. 183-1 Mirabito v. M/S Stockholt v. Sottnek Corp.

(9) Ad. 183-20 Rayford v. Gotham v. Nacirema Operating Co.

(10) Ad. 183-41 Halvorsen v. A/S Imica v. Bethlehem Steel Co.

(11)	Ad. 183-227	Perez v. Gotham v. Nacirema Operating Co.
(12)	Ad. 184-265	Fatovic v. Nederlandsche, etc. v. Jarka Corp.
(13)	Ad. 179-260	Howell v. U. S. A. v. Maher Stevedoring Corporation
(14)	Ad. 183-237	Rejlls v. SS Gezina Brovig v. States Terminal Corporation
(15)	Ad. 179-309	Di Niquilli v. U. S. A. v. American Stevedores, Inc.
(16)	Ad. 180-107	Vicki v. U. S. A. v. Maher Stevedoring Corporation*
(17)	Ad. 183-357	Hellenic Lines, Ltd. v. John W. McGrath Corporation**

CIVIL:

(18)	C 55-167	Klop v. United Fruit v. Bethlehem Steel Co.
(19)	C 57-3	Guerriero v. American President Lines v. Turner and Blanchard
(20)	C 64-3	Alvares v. Waterman Steamship v. Jarka Corp.
(21)	C 66-115	Luzzul v. Compagnie Maritime v. Transoceanic Terminal
(22)	C 68-284	Venson, et al. v. Luckenbach Steamship v. Jarka Corp.

** Action brought by shipowner to recover indemnity on contract and implied in law where the shipowner had settled with stevedore's employee and then brought this independent action.

(23) C 70-242	Marrale v. Waterman Steamship v. Jarka Corp.
(24) C 73-299	Matthews v. Compagnie Generale v. McGrath
(25) C 73-315	Torrens v. Waterman Steamship v. Jarka Corp.
(26) C 74-294	Ricci v. Lord Brasileiro v. Universal Terminal
(27) C 75-202	Coleman v. Howlett v. International Stevedoring
(28) C 75-210	Belgiovino v. Waterman Steamship v. Jarka Corp.
(29) C 77-80	Andersen v. National Bulk v. Pyrate Tank Cleaners
(30) C 77-272	Mirabito v. International Freighting Corp. v. Nessa Corp.
(31) C 79-77	Israelson v. Universal Tank Ship v. Pyrate Tank Cleaners
(32) 82-100	Perez v. Lackenbach Steamship Corp. v. Jarka Corp.
(33) C 83-160	Scala v. Moore McCormack v. Atlantic Coast Contracting Co.
(34) C 86-125	Bolten v. Khedivial Mail Line v. Jarka Corp.
(35) C 87-180	Gasparovich v. U. S. Lines v. T. Hogan & Sons
(36) C 89-19	Mazza v. A/S J. Ludwig Mowinckels Rederi v. International Stevedoring Corporation

(37) C 89-184	Fatovic v. Holland American Line v. Jarka Corporation
(38) C 90-176	Linares v. United Fruit v. Bethlehem Steel
(39) C 91-37	Brogan v. Den Norske Amerika Linje v. Turner & Blanchard
(40) C 92-127	O'Connell v. United States Lines v. T. Hogan & Sons
(41) C 93-160	Kucharski v. Luckenbach Steamship Corp. v. Jarka Corp.
(42) C 95-193	Henry v. Luckenbach Steamship Corp. v. Jarka Corp.
(43) C 96-27	Dominguez v. Moore McCormack v. Jarka Corporation
(44) C 97-303	Neloms v. Pacific Atlantic Steamship Corp. v. Jarka Corp.
(45) C 99-13	Allen v. States Marine v. Allports Stevedoring Corp.
(46) C 39-248	Stupicic v. Pan-Atlantic Steamship Corp. v. Ryan Stevedoring Co., Inc.
(47) C 79-18	Mustach v. Waterman Steamship Corp. v. Ryan Stevedoring Co., Inc.
(48) C 82-377	Espaillat v. Bull Steamship Co. v. Rinaldi & Co.
(49) C 79-210	Skupski, as Administratrix v. Western Navigation Corp. v. Maher Stevedoring Corp.
(50) C 86-70	Traponotto v. Flota Mercante Grancolombiana v. American Stevedores, Inc.

(51) C 80-227	Bonura v. Matson Navigation Company v. Brady & Gioe, Inc.
(52) C 98-167	Dillard v. Societa Armamento Marittimo v. Maher Stevedoring Corporation
(53) C 81-365	Brown, as Administratrix v. Union Sulphur v. Allports Stevedoring Co., Inc.

LIBRARY
SUPREME COURT, U.S.
MOTION FILED AUG 31 1954

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. ~~157~~ 4

RYAN STEVEDORING CO., INC.,

Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE* PURSUANT TO RULE 42

PAUL SPEER,
Counsel for Amicus Curiae,
99 John Street,
New York 38, N. Y.

TABLE OF CONTENTS

	PAGE
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
PETITIONER'S CONSENT TO FILE BRIEF	3
BRIEF	4
PRELIMINARY STATEMENT	4
ARGUMENT:	
A stevedore employer's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, *et seq.*, is a complete bar to any claim for indemnity, either partial or in full, made by a shipowner based on damages for injuries paid to an employee of the stevedore employer	6
CONCLUSION	13

CASES CITED

American Mutual Liability Ins. Co. v. Matthews, 2 Cir., 182 F. (2d) 322	10
LoBue v. United States, 2 Cir., 188 F. (2d) 800	9
Seas Shipping Co. v. Sieracki, 328 U. S. 85	5
Slattery v. Marra Bros., 2 Cir., 186 F. (2d) 134	8, 10
Spaulding v. Parry Nav. Co. Inc., et al., 2 Cir., 187 F. (2d) 257	8

STATUTES CITED

33 U. S. C. A. 901	2, 5, 6
33 U. S. C. A. 904	6
33 U. S. C. A. 905	6, 10
33 U. S. C. A. 932	12
33 U. S. C. A. 938	12

TEXT CITED

Restatement of the Law of Restitution, Sec. 86	8

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,
against
PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

NOW comes the NATIONAL ASSOCIATION OF STEVEDORES and respectfully moves this Court, pursuant to Rule 42 of the rules of this Court, for leave to file the accompanying brief in this case *amicus curiae*. The consent of the attorney for the petitioner herein for the filing of this brief has been obtained and filed with the Clerk of the Court. The consent of the attorney for the respondent was requested but was refused. The interest of the National Association of Stevedores and its reasons for leave to file a brief *amicus curiae* are set forth below.

Movant is a non-profit association composed of 150 firms engaged in stevedoring operations in 39 different ports of the United States of America, including all of the major ports of the United States of America located on the East, West and Gulf Coasts of the United States. The one hundred fifty members of the association handle the ma-

jority of the cargoes imported and exported through all of the coastal ports of the United States.

Movant desires that the accompanying brief be filed on its behalf and on behalf of all of the members of the association in order that the Court may have before it the point of view of the stevedoring industry, because the decision in this case has a far reaching effect on the stevedoring industry and its future operations. Movant has a vital interest in the questions involved herein, as presented in the petition, and as presented in the accompanying brief. Movant desires to have placed before the Court for its consideration its contention that the decision of the lower court in this case abrogates the United States Longshoremen's and Harbor Workers' Compensation Act, Title 33 U. S. C. A., Sec. 901 *et seq.*, and permits, condones and allows a circumvention of the intent and purposes of the Act by a branch of the stevedoring industry for whose benefit and protection the said Act was brought into being. The shipowners, as part of the shipping industry, should not be permitted to become a party to this circumvention of the Act and if they are desirous of protecting their interests they should be required to do so in a legal manner and not in a manner which causes a serious breach and violation of the intent and purposes of the United States Longshoremen's and Harbor Workers' Compensation Act. This point of view has not been clearly presented to this Court by the petition for a writ of certiorari herein.

The consideration of the question raised in the petition herein and the brief accompanying this petition is of great importance to the shipping industry as a whole and should receive the favorable consideration of this Court.

Respectfully submitted,

PAUL SPEER,
Counsel for National Association of Stevedores.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,

against

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

CONSENT TO FILE BRIEF AS *AMICUS CURIAE* PURSUANT TO RULE 42 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The undersigned counsel for petitioner hereby consents to the filing of the brief herein by Paul Speer as counsel for The National Association of Stevedores.

Dated: New York, N. Y.,
August , 1954.

SIDNEY A. SCHWARTZ,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1954

No. 157

RYAN STEVEDORING CO., INC.,
Petitioner,
against
PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petition for writ of certiorari herein presents to this Court two questions that are singularly important to the shipping industry, particularly to the stevedore employers engaged in furnishing stevedoring services in ports of the East, West and Gulf Coasts of the United States. These two questions as presented by the petition are:

(1) Is a contracting-stevedore, who complies with the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, United States Code, § 901, *et seq.*, insulated under the very wording of the Act (§ 905) from any claim or action in which full indemnity (there being no express contract of indemnity) is sought against him by a shipowner who has been held liable to an employee of the contracting stevedore.

(2) If the aforesaid Act, as worded, does not furnish complete immunity to a contracting stevedore against a claim of indemnity, implied in law, of

a shipowner who has been liable to an injured employee of the contracting stevedore, can there be indemnity implied in the maritime law (there being no express contract of indemnity) between joint tort-feasors in a non-collision case, i.e., a personal injury action.

The National Association of Stevedores, which is composed of 150 stevedoring firms from all of the major ports of the United States, on behalf of itself and its members, desires to file this brief in support of the petition and have this Court review and clarify what is now considered to be an unnecessarily confused and complex situation that should not have been allowed to arise because of the provisions of the U. S. Longshoremen's and Harbor Workers' Compensation Act, Title 33, U. S. C. A. Sec. 901 *et seq.*

Some contracts made between shipowners and stevedoring firms contain provisions for indemnity. Other contracts for stevedoring services do not contain any provisions for indemnification as between the shipowner and the stevedoring firm.

When a shipowner desires to have the remedy of indemnification it can legally arrange for such remedy in the contract and the stevedoring firm can then arrange its contracting price accordingly, and also take means to protect itself against the assumed liability.

When a shipowner does not arrange to specifically provide for indemnification it then can avoid liability for injuries to stevedores by taking proper precautions against negligence or unseaworthiness or by taking proper steps to spread such losses amongst the shipping industry (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85).

Due to the many claims being made, in these times, by shipowners for non-contractual indemnification, the stevedoring industry now finds itself in a position of being open, in a great many instances, to pay damages, in actions at law or in admiralty, for injuries sustained by its employees

in spite of the fact that the U. S. Longshoremen's and Harbor Workers' Act, Title 33, U. S. C. A. 901 *et seq.*, has done away with such liability and specifically provides and limits the stevedore employer's liability to its employees, and anyone else, to compensation only. It is important to the stevedoring industry that it be definitely determined if the U. S. Longshoremen's and Harbor Workers' Compensation Act sets forth the exclusive liability of the employer to its employees and anyone else, or if the purposes of the Act are to be circumvented by the means of having shipowners placed in a position of being a collecting agent for the injured stevedore employees by collecting damages from their employers for injuries, which relief is specifically barred by the U. S. Longshoremen's and Harbor Workers' Compensation Act.

It is for the foregoing summarized reasons that it is respectfully requested that favorable consideration be given by this Court to the petition for writ of certiorari herein.

ARGUMENT.

A stevedore employer's compliance with the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 *et seq.*, is a complete bar to any claim for indemnity, either partial or in full, made by a shipowner based on damages for injuries paid to an employee of the stevedore employer.

When a stevedore employer complies with the provisions of the statute dealing with compensation, 33 U. S. C. A 904, he secures the benefits of Sec. 905 of 33 U. S. C. A., which provides in part, as follows:

> "The liability of an employer prescribed in section 904 of this chapter *shall be exclusive and in place of all other liability of such employer* to the employee, his legal representative, husband or wife,

parents, dependents, next of kin, and *anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.* * * *." (Italics supplied.)

The U. S. Longshoremen's and Harbor Workers' Act at no time attempts to differentiate between the nature of the circumstances causing or resulting in illness or injury. This act covers personal injuries that have been sustained without negligence; with the negligence of the shipowner, the stevedore employer, the employee himself, or any combination thereof. The provisions with respect to the exclusiveness of the limited liability are in the same broad and general terms.

The Act eliminated entirely negligence as a basis for an employee to recover compensation for his injuries, and was a new and complete substitute for the old system and basis. When the employer has complied with the requirements of the Act, the employee is confined solely to the rights and remedies provided by the Act. The purposes and intent of the Act should not be thwarted by the indirect means of the employee using a third party to accomplish results and collect damages which were barred in their entirety when the U. S. Longshoremen's and Harbor Workers' Act was enacted.

The shipowner, with full knowledge of the provisions of the Act and the exclusiveness of liability of the stevedore employer, as provided therein, can avoid any possible resulting liability on its part by taking the necessary precautions against negligence or unseaworthiness, and by using other means to spread its financial responsibility amongst the shipping industry when it fails to exercise the necessary precautions against negligence or unseaworthiness. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

The shipowner when it presents a claim for indemnity has to base this claim on the old system of liability between employer and employee, which has been done away with by

the Act, and, in addition, is acting as an intermediary of the stevedore employee to evade the effect, purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act.

Implicit in a claim for non-contractual indemnity is a primary or basic liability in one person, though a second is also liable with that person to the third (*Restatement of Restitution, Sec. 86*). In order for a claim for non-contractual indemnity to succeed there must be that primary or basic liability in the stevedore employer. With the U. S. Longshoremen's and Harbor Workers' Act in existence there cannot be a primary or basic liability of a stevedore employer to its employee, because such liability was done away with by the U. S. Longshoremen's and Harbor Workers' Act.

In *Spaulding* v. *Parry Nav. Co., Inc., et al.*, 2 Cir., 187 F. 2d 257, action was brought by a shipowner to recover either contribution or indemnity from a ship repairer for damages which the shipowner had to pay to one of its seaman employees. In denying indemnity the Court said:

> "Parry claims indemnity from Todd on the theory that, although they were both liable to Spaulding as joint tort-feasors, Todd was the 'primary wrongdoer' and guilty of 'active negligence' in supplying an improperly secured ladder, while Parry's failure to correct the condition was only 'passive negligence.' A similar contention was very recently considered by us in Slattery v. Marra Bros., Inc., 2 Cir., 1951, 186 F. 2d 134. We there said that even on the assumption that the law of New Jersey may recognize that, when two persons are both liable for a tort, the difference in the gravity of their faults may be sufficient to justify putting the whole loss on one, *such a result is not rationally possible if only one of the two is liable to the injured person*" (p. 259). (Italics supplied.)

In *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134, a claim for indemnity was made by the lessee of a pier

against a stevedore employer. The lessee of the pier was held liable for injuries sustained by the employee of the stevedore employer. The stevedore employer had complied with the New Jersey Workmen's Compensation Act, which by its terms provided that the employer's liability was for compensation only and excluded all other liability. The Court in denying indemnity, held as follows:

> "We are therefore to assume that Slattery's contract of employment with the Spencer Company was a 'surrender * * * of * * * any other method, form or amount of compensation' for any injuries which he might receive 'in the course of his employment;' and the Spencer Company was under no liability to him of any kind. Therefore, the right of Marra Bros., Inc. to indemnity from the Spencer Company cannot rest upon any liability of that company to Slattery." (p. 138).
>
> * * * * *
>
> "We cannot, however, agree that that result (indemnity) is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong" (p. 139). (Parenthetical matter supplied.)

In *LoBue v. United States*, 2 Cir., 188 F. 2d 800, the Court in denying a claim by a shipowner that it was entitled to indemnity from a stevedore employer for an alleged breach of the stevedore's duty to the shipowner, said:

> "The United States cannot recover contribution from Jarka as a joint tort-feasor, for that presupposes a common liability to the injured party. Jarka's statutory liability to the libellant for compensation under the Longshoremen's Act is 'exclusive,' 33 U. S. C. A. § 905, and to permit contribution would be to permit the libellant to evade the statutory command by making of the negligent third party a 'conduit' for the recovery of damages from his employer in excess of the statutory compensa-

> tion. Porello v. U. S., 2 Cir., 153 F. 2d 605, 607; American Mutual Liability Insurance Co. v. Matthews, 2 Cir., 182 F. 2d 322, 323-324" (p. 802).
>
> • • • • •
>
> "And we do not think that there can be any recovery over of indemnity under the maritime law for Jarka's breach of its duty to the United States to do its work in a careful, efficient manner. • • • And to permit a partial recovery over on an indemnity theory here would be to sanction an evasion of the rule and the rationale of the Matthews case, supra, by a mere change in nomenclature from 'contribution' to 'indemnity'" (p. 803).

In *Slattery* v. *Marra Bros.*, 2 Cir., 186 F. 2d 134, the Court in dealing with active and passive negligence as a basis for a non-contractual indemnity claim, held as follows:

> "So far as we can see therefore *there is nobody of sure authority for saying that differences in the degrees of fault will without more strip one of them, and if he is an employer, of the protection of a compensation act;* and we are at a loss to see any tenable principle which can support such a result." (Italics supplied.)

In *American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, the Court in dealing with a non-contractual claim of contribution, said:

> "'To impose a non-contractual duty of contribution on the employer is pro tanto to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees" (p. 324).

In dealing with the effect of Sec. 905 of 33 U. S. C. A. as a *release* from a claim of recovery, L. HAND, Ch. J., in a concurring opinion in the cited case, said:

> "• • • and the reason why I think it should be so construed is that it has imposed upon employers an

absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. *The release should, I submit, have the same scope as the imposed liability, which extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone*" (p. 325). (Italics supplied.)

Whether the claim is for partial or full indemnity it is barred by the U. S. Longshoremen's and Harbor Workers' Act. To allow a claim for full indemnity and to deny a claim for partial indemnity because of the U. S. Longshoremen's and Harbor Workers' Act is not only inconsistent but an evasion of the intent and purposes of the Act and contrary to the rationale of the foregoing cases holding that the U. S. Longshoremen's and Harbor Workers' Act provides for the exclusive liability of the employer, eliminates the old remedies and liabilities and bars recovery other than compensation by any means by a stevedore employee from his employer based on the negligence of the employer.

The shipowners are apparently taking the position that although the U. S. Longshoremen's and Harbor Workers' Act bars any recovery by a stevedore employee from a stevedore employer, under the old system, the Act cannot prevent them from setting themselves up as a conduit by means of which a stevedore employee can circumvent and evade the purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act. The shipowners have not been deprived of any rights which they may seek to enforce. With full knowledge of the terms and conditions and intent and purposes and the effects of the U. S. Longshoremen's and Harbor Workers' Act, if they wish to retain the right of indemnity either in full or in part, they may do so by means of contract. If they wish to follow this procedure to retain the right of indemnity, then the stevedore employer can adjust the terms of the contract and take other means to protect themselves from the contractual liability

assumed by them. If the shipowner does not wish to enter into such a contract, then it is free to take other steps to avoid or minimize its financial responsibility to stevedore employees, either by taking the necessary precautions imposed by law or making arrangements to spread such financial responsibility amongst the shipping industry.

As has been pointed out, the U. S. Longshoremen's and Harbor Workers' Act abrogated one system and set up a new one in its place. The law prescribes certain definite rights, remedies and liabilities and provides that the liability of an employer so prescribed shall be exclusive and limited. The employee has a certain and speedy remedy without the necessity, difficulty or expense of establishing negligence or proving the amount of the damages. The employer is left without defense respecting the question of negligence or fault, but at the same time is assured that the recovery is exclusive and limited and that it goes directly to the relief of the injured employee. The employer is obligated to provide insurance or to furnish satisfactory proof of its financial ability to pay such compensation and to give security (Sec. 932). Failure to do so renders him liable in an action at law or in admiralty for damages, in which action certain defenses are not available to the employer (Sec. 905). Failure to secure compensation as required shall constitute a misdemeanor (Sec. 938).

What has been done below in this case is a violation of the U. S. Longshoremen's and Harbor Workers' Act for it makes the employer liable indirectly in an amount which could not be recovered directly and by reason thereof a penalty or obligation has been imposed upon the employer which was not provided for in the Act or contemplated therein and which the Act was designed to eliminate entirely. The Court below by its holding has revived in part the old system, which the Act abrogated.

The employee involved in the accident herein had no cause of action against his employer and his sole remedy

was under the U. S. Longshoremen's and Harbor Workers' Act. This cannot be questioned. However, because the third party paid the employee, the latter is in fact permitted to recover damages from the employer. In other words, the employee receives a large sum of money through a negligence action from the employer merely because the money passes through the hands of a third party, and yet it must be conceded by all that the employer is not liable to the employee for such damages.

The action of the Court below in granting indemnity circumvents and destroys the purposes and intent of the U. S. Longshoremen's and Harbor Workers' Act.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition of Ryan Stevedoring Co., Inc., for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, N. Y.

Respectfully submitted,

PAUL SPEER,
Counsel for National Association of Stevedores.

LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
FEB 21 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. 157

RYAN STEVEDORING CO., INC.,

Petitioner,

vs.

PAN ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

IN THE

Supreme Court of the United States

OCTOBER TERM—1954.

No. 157.

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE.*

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Association of American Ship Owners respectfully applies to the Court for leave to file a brief as *amicus curiae* in this case. Respondent has consented to the filing of such brief, but petitioner has refused.

Nature of the Association's Interest.

The Association of American Ship Owners is an unincorporated association of shipping companies operating under the United States flag in the coastwise, intercoastal, and foreign trades.

The primary question before the Court in this case is as to the right of a shipowner to indemnity from a stevedoring company for those damages which the shipping company has been required to pay the stevedoring company's employee injured by reason of the stevedoring company's negligence in the performance of work pursuant to contract with the shipowner and in violation of the implied terms of that contract. Petitioner, the stevedoring company, asserts that the payment of the indemnity to which the shipowner would otherwise be entitled under such circumstances would violate Section 5 of the Longshoremen's and Harbor Workers' Act, and seeks reversal on that ground.

The interest of shipowners in supporting the decision below is apparent.

Reasons for the Submission of a Brief.

The courts have traditionally given more than usual weight to public policy in the decision of maritime cases. In its recent decision in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, this Court, in deciding against the shipowner a question of personal injury law, noted, at page 286, that the "carriers" had not presented their "wishes." In a case such as the present, which will substantially affect shipping companies generally, it seems to us important that the position of the industry be made clear.

Although we have not seen the respondent's brief, it is our understanding that it gives primary emphasis to the facts of this particular case. The purpose of the applicant's brief as *amicus curiae* would be to state succinctly—the brief, already drafted, is five pages long—principles and arguments applicable to the industry generally which, in our opinion, fall within the area of the considerations upon which the Court may base its decision.

Accordingly, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

ASSOCIATION OF AMERICAN SHIP OWNERS.

By C. DICKERMAN WILLIAMS,
Counsel,
76 Beaver Street,
New York 5, N. Y.

MACLAY, MORGAN & WILLIAMS,
Of Counsel.

Office - Supreme Court, U. S.
FILED
SEP 2 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 4

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON REARGUMENT

JOHN J. BURNS,
Counsel for Amicus Curiae, American Merchant Marine Institute, Inc.,
40 Wall Street,
New York 5, New York.

Of Counsel:
ALBERT E. RICE,
T. E. BYRNE, JR.,
J. WARD O'NEILL,
JAMES M. ESTABROOK,
LOUIS J. GUSMANO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 4

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* ON REARGUMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The American Merchant Marine Institute, Inc. respectfully applies to this Court for leave to file a brief as an *amicus curiae* on the reargument of the above entitled action. Respondent has consented to the applicant's filing of a brief *amicus*. Petitioner has refused consent.

The fundamental question presented by the present petition concerns the right of a steamship company to recover from a contracting stevedore, by an action for indemnity, those damages which the steamship company may be compelled to pay to a longshoreman injured because of a condition negligently created by his own stevedore-employer.

As stated by petitioner in its motion for reargument, this question is of great importance in many cases.

Interest of American Merchant Marine Institute, Inc.

The American Merchant Marine Institute, Inc. is a non-profit New York membership corporation. Its members include 65 steamship companies which operate dry cargo and passenger vessels, colliers and tankers having a gross tonnage of nearly 6,750,000 tons. This represents about 60% of the privately owned American-flag merchant marine now operating in our foreign and domestic trades.

The problem which is presented on reargument is of extreme importance to your applicant and its member companies because the decision herein will have a direct and important bearing upon operating costs of American steamship companies.

Reasons for the Submission of Brief

At the time of the original argument herein your applicant moved to be permitted to submit a brief *amicus curiae*, which was denied. Petitioner opposed the filing of such a brief, partly on the ground that the facts in the case were not peculiar and would have no effect on any one other than the underwriters or the parties concerned. However, in its petition for re-hearing the petitioner stressed the tremendous interest of the entire shipping industry in the questions presented in the case.

Since the denial of applicant's motion to file a brief *amicus curiae* the vacancy existing in the Court has been filled and it is reasonable to assume that the entire Court may, in joining in the final determination of the case, wish to have additional views expressed by the shipping industry.

We have been advised that petitioner has filed no additional brief in this case and that its time to do so has expired. We are also advised that respondent does not intend to file additional briefs herein. Therefore applicant respectfully submits that the Court should, in this vital case, have before it a brief covering points and arguments not previously submitted.

Since the argument herein several decisions of the Court of Appeals for the Second Circuit have indicated that regardless of lack of notice, of fault, or opportunity to correct conditions a shipowner will be held absolutely liable to a longshoreman injured by a condition caused not by the shipowner or by anybody subject to his control, but rather by and through the fault of the contracting stevedore, the longshoreman's employer.[1] This same court has, however, been meticulous to avoid inequity by preserving the shipowners' rights to indemnity in such cases.[2]

Unless a shipowner is entitled to indemnity, there will be no direct and immediate economic pressure on the contracting stevedore to work toward the protection and safety of longshoremen.[3] Such a result was not contemplated in the legislative development of the Longshoremen's and Harbor Workers' Compensation Act.

In the light of this expanding liability now being established by the lower courts, we submit that our brief, emphasizing the need for a right of indemnity based upon the fundamental principle, regardless of contractual relationship, that one who has done no fault may recover from the wrongdoer, will present to the Court considerations which have not been developed by the parties.

---

[1] *Tarkinut* v. *United States Lines*, 222 F. 2d 358.
Amador v. *A/S J. Ludwig Mowinckels Rederi*, No. 313, October Term 1954; Decided July 1, 1955, not yet reported.
Poignant v. *United States of America*, No. 285, October Term 1954; Decided July 22, 1955.

[2] *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397.

[3] *Bisso* v. *Inland Waterways Corporation*, 348 U. S. 811.

For the foregoing reasons, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

AMERICAN MERCHANT MARINE INSTITUTE, INC.

JOHN J. BURNS,
Counsel for Amicus Curiae,
American Merchant Marine Institute, Inc.,
40 Wall Street,
New York 5, New York.

Of Counsel:

ALBERT E. RICE,
T. E. BYRNE, JR.,
J. WARD O'NEILL,
JAMES M. ESTABROOK,
LOUIS J. GUSMANO.

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955

No. 4

RYAN STEVEDORING CO., INC.,

Petitioner,

v.

PAN ATLANTIC STEAMSHIP CORPORATION,

Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

IN THE

Supreme Court of the United States

OCTOBER TERM—1955.

No. 4.

RYAN STEVEDORING CO., INC.,
Petitioner,

v.

PAN-ATLANTIC STEAMSHIP CORPORATION,
Respondent.

MOTION OF ASSOCIATION OF AMERICAN SHIP OWNERS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Association of American Ship Owners respectfully applies to the Court for leave to file a brief as *amicus curiae* on the reargument of this case. Respondent has consented to the filing of such brief, but petitioner has refused.

Nature of the Association's Interest.

The Association of American Ship Owners is an unincorporated association of shipping companies operating under the United States flag in the coastwise, intercoastal, and foreign trades.

The primary question before the Court in this case is as to the right of a shipowner to indemnity from a stevedoring company for those damages which the shipping company has been required to pay the stevedoring company's employee injured by reason of the stevedoring company's negligence in the performance of work pursuant to contract with the shipowner and in violation of the implied terms of that contract. Petitioner, the stevedoring company, asserts that the payment of the indemnity to which the shipowner would otherwise be entitled under such circumstances would violate Section 5 of the Longshoremen's and Harbor Workers' Act, and seeks reversal on that ground.

The interest of shipowners in supporting the decision below is apparent.

Reasons for the Renewal of the Association's Motion.

A similar motion filed by applicant on February 21, 1955, shortly before the original argument of the case, was denied by the Court.

Petitioner had opposed the motion on the ground of failure to comply with Rule 42(3) requiring that an applicant for leave to file a brief *amicus curiae* show facts or questions of law that have not been or will not be adequately presented by the parties to the matter.

As Rule 42 required that the motion be filed not later than February 21, and as respondent's brief was not then available, applicant found strict compliance with Rule 42(3) impossible. However, subsequent examination of the briefs filed by the parties on the original argument—and applicant understands that the parties will use on rearguments the same briefs they submitted on the original argument—has revealed facts and questions of law not, in our opinion, adequately presented.

Applicant's brief, as prepared to be filed if the original motion had been granted, has been revised and limited to the facts and questions [illegible] revealed. It is five pages in length.

The grounds urged by petitioner for denial of applicant's former motion are therefore not relevant to this motion.

Reasons for the Submission of a Brief.

1. The courts have traditionally given more than usual weight to public policy in the decision of maritime cases. A trade association is especially conscious of, and especially qualified to present, considerations of public policy. And the failure of the carriers to present their views in the recent case of *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282, was mentioned by this Court in its opinion, apparently as among the reasons for its adverse decision to the shipowner-respondent in that case.

This Court has only a few months ago emphatically declared that its certiorari jurisdiction is exercised in matters of importance to the public as distinguished from the parties. *Rice v. Sioux City Cemetery*, 23 U. S. Law Week, 4195. It would seem a necessary corollary that responsible representatives of those elements of the public with a stake in cases before the Court be permitted at least briefly to supplement the arguments of the parties—their fortuitous champions.

That this case is of public importance would seem no longer open to argument. This Court granted rehearing on a petition representing the case to be of "tremendous public importance" (p. 2), referring to "impact . . . on entire shipping industry" (p. 3), "tremendous importance to the Maritime Industry" (p. 3), "tremendous importance

to the one of the foremost industries of our country" (p. 4), "questions that were presented to this Court by petitioner" as "present in hundreds, if not indeed, thousands" of pending cases (pp. 4-5), and quoting a letter from Chief Judge Inch as to the numerous such cases in the Eastern District of New York (pp. 11-12).

Petitioner concluded with the assertion that the Court

> "is being asked not to concern itself with the particular litigants here involved but to settle the law between man (shipowner) and man (stevedore-employer)" (p. 5).

Why, then, should the arguments be restricted to the "particular litigants here involved," especially as vis-a-vis a trade association?

2. The parties have not, in applicant's opinion, adequately presented the considerations of public policy requiring affirmance of the decision below.

(a) In particular, they have not sufficiently emphasized and demonstrated that to adopt petitioner's contentions would be to construe the statute as *encouraging employer negligence*—an absurd result for a workmen's compensation law.

(b) The parties have not, in applicant's opinion, adequately presented the inferences to be drawn from the, in effect, concession by petitioner that an express contract of indemnity would be valid according to its terms. In short, petitioner recognizes, as it must, that any rule against contribution yields to express contract. But in so doing, petitioner gives away its case. If petitioner made a promise it is equally enforceable, whether spelled out in so many words or whether it follows by implication from undertakings expressly stated, as held by the Court below.

Accordingly, it is respectfully requested that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

ASSOCIATION OF AMERICAN SHIP OWNERS.

By C. DICKERMAN WILLIAMS,
Counsel,
76 Beaver Street,
New York 5, N. Y.

MACLAY, MORGAN & WILLIAMS,
Of Counsel.